

14  
No. 96-1133-CMY  
Status: GRANTED

Title: United States, Petitioner  
v.  
Edward G. Scheffer

Docketed:  
January 17, 1997

Court: United States Court of Appeals for  
the Armed Forces

Counsel for petitioner: Solicitor General

Counsel for respondent: Mullen, W. Craig

Entry	Date	Note	Proceedings and Orders
2	Dec 6 1996		Application (A96-412) to extend time to file a petition for a writ of certiorari from December 17, 1996 to January 16, 1997, submitted to The Chief Justice.
3	Dec 10 1996		Application (A96-412) granted by the Chief Justice extending the time to file until January 16, 1997.
1	Jan 16 1997	G	Petition for writ of certiorari filed. (Response due February 16, 1997)
4	Feb 14 1997		Waiver of right of respondent Edward G. Scheffer to respond filed.
5	Feb 19 1997		DISTRIBUTED. March 14, 1997 (Page 3)
6	Mar 10 1997	F	Response requested -- CJ.
7	Apr 9 1997		Brief of respondent Edward G. Scheffer in opposition filed.
8	Apr 21 1997		Reply brief of petitioner United States filed.
9	Apr 29 1997		REDISTRIBUTED. May 15, 1997 (Page 1)
10	May 19 1997		Petition GRANTED. SET FOR ARGUMENT November 3, 1997. *****
13	Jul 2 1997		Brief amicus curiae of Criminal Justice Legal Foundation filed.
11	Jul 3 1997		Joint appendix filed.
12	Jul 3 1997		Brief of petitioner United States filed.
14	Jul 10 1997		Brief amici curiae of Connecticut, et al. filed.
16	Aug 1 1997		Brief of respondent Edward G. Scheffer filed.
17	Aug 1 1997		Brief amicus curiae of American Polygraph Association filed.
18	Aug 1 1997		Brief amicus curiae of United States Army Defense Appellate Division filed.
19	Aug 1 1997		Brief amicus curiae of United States Navy-Marine Corps Appellate Defense Division filed.
21	Aug 1 1997		Brief amicus curiae of Committee of Concerned Social Scientists filed.
20	Aug 4 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
22	Sep 2 1997		Reply brief of petitioner United States filed.
24	Sep 16 1997		CIRCULATED.
25	Sep 17 1997		Record filed.
		*	Original record proceedings United States Court of Appeals for the Armed Forces (BOX).
26	Oct 14 1997	X	Supplemental brief of respondent Edward G. Scheffer filed.
27	Nov 3 1997		ARGUED.

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No.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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106 pp



#### QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

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PETITION FOR A WRIT OF CERTIORARI

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 44 M.J. 442. The opinion of the Air Force Court of Criminal Appeals (App., *infra*, 25a-53a) is reported at 41 M.J. 683.

**JURISDICTION**

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 18, 1996. On December 10, 1996, Chief Justice

(1)



Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

#### RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

Military Rule of Evidence 707 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth and Sixth Amendments to the United States Constitution are reprinted at App., *infra*, 77a-78a.

#### STATEMENT

Following trial by a general court-martial, respondent was convicted of uttering 17 insufficient-funds checks, using methamphetamine, failing to go to his appointed place of duty, and wrongfully absenting himself from the base for 13 days, in violation of Articles 123a, 112a, and 86 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 923a, 912a, and 886. He was sentenced to 30 months' confinement, to forfeiture of all pay and allowances, and to a bad conduct discharge. The Air Force Court of Criminal Appeals affirmed, with the proviso that

respondent should receive credit for one day's forfeitures. App., *infra*, 25a-53a. The Court of Appeals for the Armed Forces reversed and remanded. *Id.* at 1a-24a.

1. This case involves the constitutional validity of a rule excluding from court-martial proceedings in the armed forces any evidence of a polygraph examination. In broad terms, a polygraph examination is a credibility assessment; it is based on an expert examiner's interpretation of physiological responses that are controlled by the subject's autonomous nervous system. After a preliminary interview with the subject, the examiner asks a number of questions while measuring the subject's relative blood pressure (obtained from an inflated cuff on the upper arm) and other indications of blood flow, his "galvanic skin response" (*e.g.*, palmar sweating), and his respiration (obtained from sensors placed on the subject's chest or abdomen). The questions asked in most tests ordinarily fall into three broad categories: direct accusatory questions concerning the matter under investigation, irrelevant or neutral questions, and more general (so-called "control") questions concerning whether the subject has engaged in wrongdoing. The examiner forms an opinion with respect to the subject's truthfulness by comparing the subject's physiological reactions to each set of questions. See generally 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* 219-222 (2d ed. 1993); C. Honts & B. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D.L. Rev. 987, 989-993 (1995).

In *United States v. Gipson*, 24 M.J. 246 (1987), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) concluded that poly-



graph techniques had reached a sufficient degree of reliability that evidence of a polygraph examination should not be routinely excluded from court-martial proceedings under Military Rule of Evidence 702.<sup>1</sup> The court noted that "[i]f anything is clear, it is that the battle over polygraph reliability will continue to rage," but it concluded that "until the balance of opinion shifts decisively in one direction or the other, the latest developments \* \* \* should be marshaled at the trial level." 24 M.J. at 253. Accordingly, the court held that a serviceman who testifies at his court-martial trial is entitled to lay a foundation showing the scientific basis for polygraph results consistent with his exculpatory testimony. *Id.* at 252-253.

On June 27, 1991, "[b]y the authority vested in [him] as President by the Constitution of the United States and by chapter 47 of title 10 of the United States Code [*i.e.*, the UCMJ]," the President responded to *Gipson* by promulgating Military Rule of Evidence 707.<sup>2</sup> See Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.). The drafters' commen-

<sup>1</sup> Military Rule of Evidence 702, like its counterpart in the Federal Rules of Evidence, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

<sup>2</sup> Article 36(a) of the UCMJ, 10 U.S.C. 836(a), provides that "[p]retrial, trial, and post-trial procedures, including modes of proof \* \* \* may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

tary that accompanied the rule explained its adoption by reference to several policies:

There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near-infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). \* \* \* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the [court-martial] members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of the polygraphs. \* \* \* Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence.

App., *infra*, 82a-83a. Those considerations, the drafters stated, warrant "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial." *Id.* at 83a.

2. On March 27, 1992, respondent, an airman stationed at March Air Force Base, California, opened a checking account with the Security Pacific Bank with a \$277 deposit. He made no arrangements for his pay to be deposited into the account, and he withdrew \$200 on the same day the account was opened. On March 31, 1992, respondent telephoned the bank and stated that he had lost his ATM card and the temporary checks that the bank had issued for the account. He was apparently told that the account would be closed for security reasons. After that tele-

phone call, between April 1 and May 3, respondent wrote 17 checks on the account, totalling approximately \$3,300 in checks drawn on insufficient funds. See App., *infra*, 25a; 3 Trial Rec. 237-245, 249.

In late March 1992, as he was beginning the Security Pacific scheme, respondent volunteered to assist the Air Force Office of Special Investigations (OSI) with drug investigations, and informed OSI that he had information on two civilians who were dealing in significant quantities of drugs. App., *infra*, 2a, 26a. On April 7, 1992, one of the OSI agents supervising respondent requested that respondent submit to a urine test. Respondent agreed, but he stated that he could not provide a urine specimen then, because he urinated only once a day. He submitted to a urinalysis on the following day. On May 14, 1992, OSI agents learned that respondent's urine had tested positive for methamphetamine. *Id.* at 26a-27a.

On April 10, 1992, two days after providing a urine sample, respondent agreed to take a polygraph administered by an OSI examiner. According to the examiner, respondent's polygraph charts "indicated no deception" when respondent denied that he had used drugs since joining the Air Force. App., *infra*, 2a-3a, 26a-27a. Later that month, on April 30, 1992, respondent unaccountably failed to appear for work and could not be found on the base. Respondent was not heard from again until May 13, 1992, when an Iowa State Patrolman telephoned the base with news that respondent had been arrested in that State following a routine traffic stop; upon learning that respondent was AWOL, the patrolman held respondent for return to the base. See 3 Trial Rec. 258-259, 265-267.

At his trial, respondent advised the court that he intended to testify in his defense, and that he wished to rely on "the results of the exculpatory polygraph" to corroborate "an innocent ingestion defense" to the drug charges. 2 Trial Rec. 42, 43-44. Respondent argued that Rule 707 "is unconstitutional if it prohibits an accused from introducing relevant and helpful exculpatory evidence," and he argued that he should be permitted to lay a foundation "to show that in this particular case \* \* \* the polygraph results are relevant and helpful." 2 Trial Rec. 44.

The military judge noted that "[f]or evidence to be helpful, the testimony of the polygrapher would have to be in an area in which the factfinder himself needs help in making a decision." 2 Trial Rec. 46. In his view,

the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant.

*Ibid.* The military judge also noted that "[t]he fact finder might give \* \* \* too much weight" to polygraph testimony, and that arguments about such testimony could take "an inordinate amount of time and expense. \* \* \* Given those concerns, I don't believe that the constitution prohibits the President from appropriately ruling that polygraph evidence will not be admitted in a court-martial." *Ibid.* Respondent later testified that he did not recall "knowingly" ingesting methamphetamine. He was convicted. App., *infra*, 3a-4a.

3. The Air Force Court of Criminal Appeals, sitting en banc, rejected respondent's contention that



the exclusion of the polygraph evidence deprived him of a fair trial. App., *infra*, 25a-53a. After reviewing this Court's decisions in *Washington v. Texas*, 388 U.S. 14 (1967), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44 (1987), see App., *infra*, 32a-35a, the court concluded that the Constitution forbids evidentiary rules that "arbitrarily limit the accused's ability to present reliable evidence," "arbitrarily limit admission [of evidence] by the defense to a greater degree than by the prosecution," or "arbitrarily infringe on the right of the accused to testify on his own behalf." *Id.* at 40a.

The court noted that Rule 707 is "equally applicable to both the prosecution and the defense" and does "not infringe on the right of the accused to testify on his own behalf." App., *infra*, 43a. It also observed that Rule 707 could not be viewed as an "arbitrary" limitation on reliable evidence, because "[t]he President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning." App., *infra*, 40a. The court explained that there remain "valid concerns" about polygraph examinations and that:

The President is rightly concerned that court-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the value of the evidence.

*Id.* at 41a. The court concluded "[w]hile it might be arbitrary for the President to promulgate a rule" barring evidence that is widely accepted by courts as reliable, "such as fingerprint evidence" (*id.* at 43a),

the President acted within his authority in barring polygraph evidence, which routinely is ruled inadmissible by the civilian courts (*id.* at 42a-43a).

Judge Pearson, joined by Judge Schreier, dissented in part. App., *infra*, 49a-53a. He believed that properly conducted polygraph examinations may provide "vital" evidence in a case in which the defendant's credibility "becomes the whole ball game." *Id.* at 51a.

4. By a three to two vote, the United States Court of Appeals for the Armed Forces reversed. The court agreed with respondent's claim that Rule 707 "violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by" respondent. App., *infra*, 4a. Assuming that the President properly promulgated Rule 707 pursuant to the UCMJ, see App., *infra*, 7a, the court concluded that, under *Rock v. Arkansas*, *supra*, the President's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions [of evidence] that may be reliable in an individual case." App., *infra*, 8a (quoting *Rock*, 483 U.S. at 61). The court acknowledged that *Rock* "concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony," but it could "perceive no significant constitutional difference between the two." App., *infra*, 9a.

Finally, the court noted that in *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996), this Court upheld a state "statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue." App., *infra*, 13a. The court observed, however, that *Egelhoff* was a "fragmented" decision that is best

read as “founded on the power of the state to define crimes and defenses.” *Id.* at 14a. The court also found *Egelhoff* inapposite because Rule 707 does not address a fact to be proved, but instead “bars otherwise admissible and relevant evidence based on the mode of proof by categorically including polygraph evidence. While the plurality in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n.1, only four justices joined in that observation.” App., *infra*, 15a.<sup>3</sup>

Judges Sullivan and Crawford filed separate dissents. App., *infra*, 16a-24a. Judge Sullivan’s dissent was based on his concurring opinion in *United States v. Williams*, 43 M.J. 348 (1995), cert. denied, 116 S. Ct. 925 (1996), a case in which the court of appeals had declined to address the constitutional validity of Rule 707, because the accused did not testify. App., *infra*, 67a-68a. Writing separately in *Williams*, Judge Sullivan concluded that polygraph evidence is inadmissible under Military Rule of Evidence 608, which restricts what evidence may be offered in support of a witness’s “character for \* \* \* truthfulness.” App., *infra*, 75a. Judge Sullivan believed, moreover, that such evidence “infringes on the jury’s role in

<sup>3</sup> The court also noted that in *Wood v. Bartholomew*, 116 S. Ct. 7 (1995) (per curiam), this Court summarily reversed the Ninth Circuit’s determination that a state prosecutor violated his duties under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the results of certain polygraph examinations. App., *infra*, 12a-13a. The court observed that *Bartholomew* involved “prosecution witnesses, not the accused,” and it added that while this Court “noted that polygraph evidence was inadmissible under [state] law, \* \* \* [t]he constitutionality of the state law was not before the Court and \* \* \* was not addressed.” *Id.* at 12a-13a.

determining credibility,” because “[o]ur adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes.” *Id.* at 75a-76a (internal quotation marks omitted). In his view, Rule 707 “properly” addresses those concerns. App., *infra*, 76a.

Judge Crawford argued that a defendant’s right to present relevant evidence “is ‘not [an] absolute,’” and must yield to policy considerations such as those that supported the President’s decision to adopt Rule 707. App., *infra*, 17a, 21a. He also took issue with the court’s characterization of *Egelhoff*, noting that the four-Justice plurality and the four dissenting Justices agreed “that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so.” *Id.* at 21a. Finally, Judge Crawford argued that the court’s ruling would have a seriously adverse impact on the military’s “worldwide system of justice.” *Ibid.*

#### REASONS FOR GRANTING THE PETITION

The court of appeals held that Military Rule of Evidence 707’s categorical preclusion of polygraph evidence from courts-martial violates the Sixth Amendment right of a testifying defendant to present a defense. That holding conflicts with judgments of state and federal courts, which have consistently upheld the constitutionality of rules precluding polygraph evidence from criminal trials. It also misapplies this Court’s Sixth Amendment decisions, which recognize that categories of evidence may be excluded from criminal trials where (as here) the exclusion is neither arbitrary nor disproportionate to legitimate interests. Finally, the holding threatens to burden military justice with case-by-case litigation



about polygraph evidence, a result that is at odds with the assigned function of the military to attend to the Nation's defense and the purpose of Rule 707 to avoid those costs. Accordingly, this Court's review is warranted.

1. The rule invalidated by the Court of Appeals for the Armed Forces has counterparts in the evidentiary rules of numerous States, which categorically prohibit the introduction of polygraph evidence in criminal cases. See, e.g., *State v. Okumura*, 894 P.2d 80, 94 (Haw. 1995) ("well-established precedent in this jurisdiction" is that "polygraph results are not admissible at trial whether offered by the prosecution or the defense"); *Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991) ("ample basis for this Court to reiterate the inadmissibility of polygraph results and flatly declare that under no circumstances should polygraph results be admitted into evidence"); *Commonwealth v. Mendes*, 547 N.E.2d 35, 41 (Mass. 1989) ("supported by the overwhelming authority throughout the country, we announce that polygraphic evidence \* \* \* is inadmissible in criminal trials in this Commonwealth either for substantive purposes or for corroboration or impeachment of testimony"); *State v. Lyon*, 744 P.2d 231, 232-233 (Or. 1987) ("the available authority is almost unanimous in holding that polygraph results may not be introduced into evidence upon the motion of either party"); *State v. Miller*, 522 A.2d 249, 260 (Conn. 1987) (adhering to "traditional rule \* \* \* that polygraph results are per se inadmissible when offered by either party, either as to substantive evidence or as related to the credibility of the witness"); see also *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986).

The rule excluding polygraph evidence has traditionally had broad support in the federal courts of appeals as well. See P. Giannelli & E. Imwinkelreid, *Scientific Evidence* 232-235 (2d ed. 1993) (noting that a majority of federal courts, like their state counterparts, "follow[s] the traditional rule, holding polygraph evidence inadmissible per se") (collecting authorities). Several courts of appeals have retreated from that categorical position since this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which held that, under Federal Rule of Evidence 702, expert testimony may not be excluded solely because it is based on a scientific theory that has not yet achieved "general acceptance," as was formerly required under *Frye v. United States* 293 F. 1013 (D.C. 1923). See, e.g., *United States v. Cordoba*, No. 95-50492 (9th Cir. Jan. 7, 1997), slip op. 102-103; *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); compare *United States v. Sherlin*, 67 F.3d 1208, 1216-1217 (6th Cir. 1995) (polygraph evidence generally inadmissible under Fed. R. Evid. 403), cert. denied, 116 S. Ct. 795, and 116 S. Ct. 1548 (1996). No court, however, has suggested that such a "case by case" approach to polygraph evidence is required by the Constitution.

To the contrary, the courts of appeals consistently have rejected the proposition that a rule that categorically excludes polygraph evidence violates the constitutional rights of criminal defendants. See *Jackson v. Garrison*, 677 F.2d 371, 373 (4th Cir.) (state court, in declining to admit favorable result of test administered by law-enforcement agent, "did not negate the fundamental fairness of [his] trial or violate a specific constitutional right"), cert. denied, 454 U.S. 1036 (1981); *Bashor v. Risley*, 730 F.2d



1228, 1238 (9th Cir.) (because jury could determine witness's credibility from his demeanor, "[e]xclusion of the polygraph evidence did not result in an unfair trial"), cert. denied, 469 U.S. 838 (1984); *United States v. Gordon*, 688 F.2d 42, 44-45 (8th Cir. 1982) (rejecting "argument that refusal to admit [polygraph] test results amounts to a denial of due process"). In ruling that the Constitution forbids a categorical rule barring polygraph evidence—and by thus requiring a case-by-case analysis of such evidence whenever offered by a testifying defendant—the Court of Appeals for the Armed Forces has departed from the uniform course of lower court decisions.

2. The court of appeals' analysis finds no support in this Court's Sixth Amendment jurisprudence. By protecting the defendant's right to confront the witnesses against him, to present the testimony of his own witnesses, and to enjoy the assistance of counsel, the Sixth Amendment spells out "the basic elements of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Those Sixth Amendment rights guarantee that the defendant in a criminal case has a fair opportunity to present his version of the facts so that the factfinder "may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

As this Court has recognized, however, a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *Washington v. Texas*, 388 U.S. at 23. Accordingly, testimony may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness

and reliability—even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. at 690. Indeed, as Judge Crawford noted below (App., *infra*, 21a), eight Justices expressly reaffirmed that principle last Term in *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996); the Court divided only on the question whether the interest asserted by Montana met that test. See *id.* at 2022 (plurality opinion of Scalia, J.); *id.* at 2028-2029 (O'Connor, J., dissenting) (arguing that Montana improperly barred intoxication evidence for the sole purpose of increasing convictions, whereas "[t]he purpose of the familiar evidentiary rules is \* \* \* to vindicate some other goal or value—e.g., to ensure the reliability and competency of evidence"); see also *id.* at 2032 (Souter, J., dissenting) ("A State may typically exclude even relevant and exculpatory evidence if it presents a valid justification for doing so").

This Court has stated that evidentiary restrictions on the presentation of defense evidence are constitutionally suspect only when they are arbitrary or disproportionate to the legitimate interests they are designed to serve. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987). That cannot be said of Rule 707. That rule addresses polygraph evidence that purports to gauge the credibility of witnesses; yet since time immemorial our system has entrusted credibility determinations to the judgment of juries, which assess credibility in reliance on their common-sense evaluations of demeanor, bias, and the plausibility of the narrative. It is entirely legitimate for an evidentiary system to preserve for the factfinder its unique province of assessing credibility based on first-hand observation of the testifying witness.

At the same time, a scientific technique whose reliability and helpfulness are widely questioned by

scientists and courts alike may surely be made the subject of a categorical exclusionary rule. An evidentiary system that excludes such evidence need not take sides in a scientific debate; it need only recognize, as the President did in promulgating Rule 707, that the technique's lack of broad acceptance will result in time-consuming collateral litigation designed to ensure that the factfinder is not confused or unduly swayed by the purported scientific basis that supports it. In such circumstances, exclusion of evidence based on that technique furthers the truth-finding function of the trial; it does not violate the Sixth Amendment.

3. The constitutional principle embraced by the court of appeals not only conflicts with a longstanding rule of evidence followed by state and federal civilian courts—and still followed by many courts today—but the costs imposed by that novel principle are particularly unwarranted and onerous in the military context.

As this Court has recognized, "the military in important respects remains a 'specialized society separate from civilian society,' " *Weiss v. United States*, 510 U.S. 163, 174 (1994) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)); see also *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996), whose essential function is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); see also *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). Military trials are necessary "to maintain discipline," but they are "merely incidental to an army's primary fighting function." *Quarles*, 350 U.S. at 17. "To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not

served." *Ibid.* Thus, the introduction of procedural complexities into military trials is "a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976).

The court of appeals' opinion does not reflect consideration of those factors, which have long informed this Court's assessment of rules designed for military trials. Nor does that decision reflect the great deference properly due to the judgments of the political branches in this area. See, e.g., *Weiss*, 510 U.S. at 177; *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Invoking his powers under the Constitution, see U.S. Const., Art. II, § 2, Cl. 1, and an express congressional delegation authorizing him to prescribe rules of evidence for courts-martial, see 10 U.S.C. 836(a), the President concluded that polygraph evidence is unnecessary for reliable credibility assessments, that its admission could confuse courtmembers, and that case-by-case litigation about its admissibility would waste the time of servicemembers whose "primary \* \* \* function" (*Quarles*, 350 U.S. at 17) is elsewhere. The court of appeals' conclusion that the President's judgment contravenes the Sixth Amendment warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1997

APPENDIX A

UNITED STATES COURT OF APPEALS  
 FOR THE ARMED FORCES

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No. 95-0521

Crim. App. No. 30304

UNITED STATES, APPELLEE

*v.*

EDWARD G. SCHEFFER, Airman  
 U.S. Air Force, APPELLANT

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Argued May 8, 1996  
 Decided Sep. 18, 1996

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OPINION OF THE COURT

GIERKE, Judge:

A general court-martial composed of officer members at March Air Force Base, California, convicted appellant, contrary to his pleas, of uttering bad checks, wrongfully using methamphetamine, failing to go to his appointed place of duty, and absenting himself from his unit (13 days), in violation of Articles 123a, 112a, and 86, Uniform Code of Military

(1a)



Justice, 10 USC §§ 923a, 912a, and 886, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence but awarded one day of credit against his sentence to forfeitures (confinement had expired) for lack of timely pretrial confinement review, relying on *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *United States v. Rexroat*, 38 MJ 292 (CMA 1993). See 41 MJ 683, 693 (1995).

We granted review of the following issue:

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO PRESENT EVIDENCE OF A FAVORABLE POLYGRAPH RESULT CONCERNING HIS DENIAL OF USE OF DRUGS WHILE IN THE AIR FORCE.

In March of 1992, appellant began working as an informant for the Air Force Office of Special Investigations (OSI). During late March and early April, appellant told OSI that two civilians, Davis and Fink, were dealing in significant quantities of drugs. On April 7, 1992, at the request of OSI, appellant voluntarily provided a urine sample. Periodic urinalyses are normal procedure for controlled informants.

On April 10, OSI asked appellant to submit to a polygraph examination. The OSI polygraph examiner asked appellant three questions: (1) Had he ever used drugs while in the Air Force; (2) Had he ever lied in any of the drug information he gave to OSI; and (3) Had he told anyone other than his parents that he was assisting OSI? Appellant answered "No"

to each question. The polygraph examiner concluded that "no deception" was indicated.

Appellant's urinalysis tested positive for methamphetamine. The report was dated May 20, although local OSI agents may have learned of the results as early as May 14.

At trial appellant asked the military judge for an opportunity to lay a foundation for the favorable polygraph evidence. The military judge denied the request without receiving any evidence, ruling that "the President may, through the Rules of Evidence, determine that credibility is not an area in which a factfinder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant." He further ruled that under Mil.R.Evid. 403, Manual for Courts-Martial, United States (1995 ed.),

[t]he factfinder might give it too much weight, and that there is an inordinate amount of time and expense, especially in the cases where there may be conflicting tests, which doesn't appear to be the case here. The main confusion of the issue; that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs.

During the trial on the merits, appellant testified that he visited Davis on April 6, left Davis' house around midnight, and began driving toward March Air Force Base. The next thing he remembered was waking up the next morning in his car in a remote area, not knowing how he got there. He denied "knowingly" ingesting drugs at any time between March 5, when he began working for OSI, and April

7, the date he provided the urine sample that tested positive for methamphetamine.

Trial counsel cross-examined appellant about inconsistencies between his trial testimony and earlier statements to the OSI, and his lack of a "sudden rush of energy" and other symptoms of ingesting methamphetamine. Trial counsel's closing argument urged the court members to look at appellant's credibility. Trial counsel argued, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II."

Appellant asserts that Mil.R.Evid. 707 violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by appellant. He argues that he was constitutionally entitled to be given an opportunity to rebut the attack on his credibility as a witness by laying a foundation for favorable polygraph evidence. The Government asserts that the Rule does not impermissibly infringe on the Sixth Amendment. It argues that Mil.R.Evid. 707 merely codifies all the evidentiary prohibitions against polygraph evidence and that, even without Mil.R.Evid. 707, polygraph evidence would never be admissible. We agree with appellant.

In *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), polygraph evidence was held to be inadmissible because it was unreliable. In *United States v. Gipson* 24 MJ 246, 253 (1987), our Court held that an accused is "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. In arriving at that holding, our Court acknowledged that Mil.R.Evid. 702 "may be broader and may supersede *Frye v. United States*," *supra*. 24 MJ at 252.

The impact of our *Gipson* decision was short-lived, however, because on June 27, 1991, the President promulgated Mil.R.Evid. 707 in Executive Order No. 12767, § 2, 56 Fed. Reg. 30296.

Mil.R.Evid. 707 provides: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Unlike most military rules of evidence, Mil.R.Evid. 707 has no counterpart in the Federal Rules of Evidence. It is similar to Cal.Evid. Code 351.1 (West 1988 Supp.). See *People v. Kegler*, 197 Cal. App. 3d 72, 84, 242 Cal. App. 897, 905 (1987). Mil.R.Evid. 707 "is not intended to accept or reject *United States v. Gipson*, 24 MJ 246 (CMA 1987), concerning the standard for admissibility of other scientific evidence under Mil.R.Evid. 702 or the continued vitality of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." Drafters' Analysis of Mil. R.Evid. 707, Manual, *supra* (1995 ed.) at A22-48.

Presidential authority to promulgate rules of evidence is founded on Article 36(a), UCMJ, 10 USC § 836(a). That Article provides that such rules "shall, so far as [The President] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

Appellant's case presents two questions. The first is a statutory question: did the President comply with Article 36 when he promulgated Mil.R.Evid. 707. The second is a constitutional question: does Mil.R. Evid. 707 violate the Sixth Amendment. We review



these questions of law *de novo*. *United States v. Ayala*, 43 MJ 296, 298 (1995).

The statutory question was neither briefed nor argued. It may well be that the *per se* prohibition in Mil.R.Evid. 707 is "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S.Ct. 2786, 2794 (1993). We note that the majority of the federal circuits do not have a *per se* prohibition against polygraph evidence. Instead, they rely on the trial judge to apply a *Daubert* analysis and apply Fed. R. Evid. 401-03. *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (no *per se* rule against admissibility of polygraph evidence); *see United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (reversing *per se* exclusion of polygraph evidence); *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (holding that polygraph evidence not inadmissible *per se*); *Anderson v. United States*, 788 F.2d 517, 519 n. 1 (8th Cir. 1986) (polygraph evidence admissible by stipulation); *see also United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n. 4 (4th Cir. 1991) (holding that polygraph evidence not admissible in 4th Circuit but recognizing that "[c]ircuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority"). *But see United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph results "inherently unreliable"); *United States v. A & S Council Oil Co.*, *supra* (polygraph evidence not admissible); *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987) (polygraph evidence "not admissible to show" that witness "is truthful"); *United States v.*

*Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (adhering to *Frye* and holding polygraph evidence inadmissible); *Dowd v. Calabrese*, 585 F.Supp. 430 (D. D.C. 1984) (polygraph results not sufficiently reliable to be admissible).

The Federal rules are virtually identical to Mil.R. Evid. 401-03. Whether the President determined that prevailing federal practice is not "practicable" for courts-martial cannot be determined from the record before us. Assuming without deciding that the President acted in accordance with Article 36 and determined that the prevailing federal rule is not "practicable" for courts-martial, we turn to the constitutional question.

Our Court entertained a direct attack on the constitutionality of Mil.R.Evid. 707 in *United States v. Williams*, 43 MJ 348 (1995). We held, however, "that the accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis." 43 MJ at 355. *See also United States v. Abeyta*, 25 MJ 97, 98 (CMA 1987) (polygraph evidence not relevant unless accused testifies). In *Williams* we observed: "Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused's constitutional trial rights." 43 MJ at 353.

Unlike *Williams*, this appellant testified, placed his credibility in issue, and was accused by the prosecution of being a liar. Thus the constitutional issue is squarely presented. We hold that Mil.R.Evid. 707, as applied to this case, is unconstitutional. A *per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility, without

giving him an opportunity to lay a foundation under Mil.R.Evid. 702 and *Daubert*, violates his Sixth Amendment right to present a defense. We limit our holding to exculpatory evidence arising from a polygraph examination of an accused, offered to rebut an attack on his credibility. We leave for another day other constitutional questions such as those involving government-offered polygraph evidence or evidence of a polygraph examination of a witness other than an accused.

The Sixth Amendment grants an accused "the right to call 'witnesses in his favor.'" *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). An accused's right to present testimony that is relevant and material may not be denied arbitrarily. *Washington v. Texas*, 388 U.S. 14, 23 (1967); see *United States v. Woolheater*, 40 MJ 170, 173 (CMA 1994).

The right to present evidence, however, is not unlimited, but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). See, e.g., *Washington v. Texas*, 388 U.S. at 23 n. 21 (right to present testimony may be limited by testimonial privileges or rules relating to mental ability to testify). When restrictions are placed on an accused's right to present evidence, they "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. at 56. Applying the foregoing principles, the Supreme Court held in *Rock* that a *per se* rule excluding the defendant's hypnotically refreshed testimony infringed his right to present a defense. The Supreme Court held that a "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."

483 U.S. at 61. While *Rock* concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony, we perceive no significant constitutional difference between the two. In either case, the Sixth Amendment right to present a defense is implicated.

Mil.R.Evid. 702 permits expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is subject to the relevance requirements of Mil.R.Evid. 401 and 402 and the balancing requirements of Mil.R.Evid. 403. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 597, 113 S.Ct. at 2798, the Supreme Court made the trial judge a gatekeeper, trusted with responsibility to decide if novel scientific evidence was sufficiently relevant and reliable to warrant admission.

An expert witness may not testify that a declarant was telling the truth, but may testify to the absence of indicia of deception. Thus, in *United States v. Cacy*, 43 MJ 214, 218 (1995), we held that it was not error to permit an expert to testify that a victim's accusation did not appear to be feigned or rehearsed. Similarly, in *United States v. Suarez*, 35 MJ 374, 376 (CMA 1992), we held that it was not error for an expert to opine that counter-intuitive conduct, such as recanting an accusation, inconsistent statements, or failing to report abuse is not necessarily inconsistent with a truthful accusation. See also *United States v. Houser*, 36 MJ 392, 398-400 (CMA 1993). Finally, we have permitted experts to opine whether a complainant "can differentiate between fantasy and fact." *United States v. Palmer*, 33 MJ 7, 12 (CMA



1991); *United States v. Tolppa*, 25 MJ 352, 354-55 (CMA 1987), citing *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986). Under the same rationale as these cases, a properly qualified expert, relying on a properly administered polygraph examination, may be able to opine that an accused's physiological responses to certain questions did not indicate deception.

Polygraph examinations were relatively crude when *Frye* was decided. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 585, 113 S.Ct. at 2793. The Eleventh Circuit has recognized that, "[s]ince the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique." *United States v. Piccinonna*, 885 F.2d 1529, 1532 (11th Cir. 1989); see also *United States v. Galbreth*, 908 F. Supp. 877 (D. N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995). The effect of Mil.R. Evid. 707 is to freeze the law regarding polygraph examinations without regard for scientific advances. We believe that the truth-seeking function is best served by keeping the door open to scientific advances. See *United States v. Youngberg*, 43 MJ 379 (1995) (holding DNA evidence admissible); *United States v. Nimmer*, 43 MJ 252, 260 (1995) (remanding for hearing on reliability of hair analysis evidence). With respect to appellant's case, we like the Fifth Circuit, cannot determine "whether polygraph technique can be said to have made sufficient technological advance in the seventy years since *Frye* to constitute the type of 'scientific, technical, or other specialized knowledge' envisioned by Rule 702 and *Daubert*." *United States v. Posado*, 57 F.3d at 433. We will never know, unless we give appellant an opportunity to lay the foundation.

Like the Court in *Posado*, "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility." 57 F.3d at 434. Foundation evidence for proffered polygraph evidence must establish that the underlying theory—that a deceptive answer will produce a measurable physiological response—is scientifically valid. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 592-93. Furthermore, we would expect evidence that the theory can be applied to appellant's case. *Id.* The foundation must include evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.

As required by *Daubert*, the military judge must be a gatekeeper and weigh probative value against prejudicial impact in accordance with Mil. R. Evid. 403. We find the *Piccinonna* guidance apt:

[T]he trial court may exclude polygraph expert testimony because 1) the polygraph examiner's qualifications are unacceptable; 2) the test procedure was unfairly prejudicial or the test was poorly administered; or 3) the questions were irrelevant or improper. The trial judge has wide discretion in this area, and rulings on admissibility will not be reversed unless a clear abuse of discretion is shown.

885 F.2d at 1537; see also *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996) (judge's ruling on admissibility of polygraph evidence reviewed for abuse of discretion).

This was not a private, *ex parte* examination under unknown conditions. See *United States v. Sherlin*, 67 F.3d 1208, 1217 (6th Cir. 1995) ("unilaterally" obtained and "privately commissioned" polygraph excluded). To the contrary, appellant proffers a government-initiated examination by an OSI examiner. Accordingly, there would appear to be no need to condition admissibility on having appellant examined by a polygraph examiner chosen by the prosecution. See *United States v. Piccinonna*, 885 F.2d at 1536.

Finally, the issues raised by the dissenting opinion warrant comment. Both *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984), involve polygraph examinations of prosecution witnesses, not the accused. Our holding, as was that in *Rock*, is limited to an accused's right to lay the foundation for a polygraph examination of himself. We need not and do not address admissibility of polygraph examinations of government witnesses or the question whether such polygraph evidence would be constitutionally required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). But cf. *United States v. Simmons*, 38 MJ 376 (CMA 1993) (trial counsel failed to discover and disclose contradictory statements of rape prosecutrix made to government polygrapher).

Furthermore, *Bartholomew* involves an issue different from the one in the case before us. It is summary disposition of a habeas corpus case, where the Supreme Court concluded that the Ninth Circuit misapplied the Court's *Brady* jurisprudence. 116 S.Ct. at 8. The Supreme Court noted that polygraph evidence was inadmissible under Washington state law, but premised its holding on the speculative nature of

the additional evidence that might have been discovered, counsel's concession "that disclosure would not have affected the scope of his cross-examination," and the "overwhelming" evidence of guilt. 116 S.Ct. at 10-11. The constitutionality of the state law was not before the Court and therefore, consistent with the Court's practice, it was not addressed. See *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 n. 22 (1947) ("It has long been this Court's considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied.' ")

*Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), also involves a constitutional issue different from the one before us. *Egelhoff* involves legislative action redefining an element of an offense, not executive rule-making about modes of proof. The President, unlike the Montana legislature, lacks authority to create and define offenses. See Art. 36(a), UCMJ, 10 USC § 836(a); *United States v. Hemingway*, 36 MJ 349, 351 (CMA 1993); *United States v. Smith*, 13 USCMA 105, 119, 32 CMR 105, 119 (1962).

In *Egelhoff*, the Supreme Court upheld a statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue. The statute in question, Mont. Code Ann. § 45-2-203, provided that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." 116 S.



Ct. at 2016. The Supreme Court's decision is fragmented, with four justices speaking in the plurality opinion, joined by Justice Ginsburg who concurred in the judgment separately; and four other Justices dissented in three separate opinions.

We read the holding in *Egelhoff* as founded on the power of the state to define crimes and defenses. The Montana statute was based on a legislative decision to resurrect "the common-law rule prohibiting consideration of voluntary intoxication" in determining whether the defendant had the requisite *mens rea*. 116 S. Ct. at 2020. In short, Montana decided to preclude voluntary intoxication from being asserted as a defense. The plurality explained:

"The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas*, 392 U.S. 514, 535-536 (1968) (plurality opinion). The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so, and the judgment of the Supreme Court of Montana to the contrary must be reversed.

116 S. Ct. at 2023-24.

The Montana rule excludes evidence based on the fact to be proven (voluntary intoxication) rather than on the mode of proof. Abolishing a defense is within the authority of a state legislature. On the other hand, Mil.R.Evid. 707 bars otherwise admissible and relevant evidence based on the mode of proof by categorically excluding polygraph evidence. While the plurality opinion in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n. 1, only four Justices joined in that observation.

Justice Ginsburg points out in her separate concurrence in *Egelhoff* that the statute does not appear among Montana's evidentiary rules, but in the chapter pertaining to substantive crimes. She opines that the Montana law is "a measure redefining *mens rea*," and as such is well within the power of a state to define crimes. 116 S. Ct. at 2024-25. The four Justices in the plurality opinion state that they are "in complete agreement" with Justice Ginsburg's analysis. They explain that they "address [the statute] as an evidentiary statute simply because that is how the Supreme Court of Montana chose to analyze it." 116 S. Ct. at 2020-21 n. 4. Justice Ginsburg, along with the four dissenters, recognized that "a rule designed to keep out 'relevant, exculpatory evidence' . . . offends due process." 116 S. Ct. at 2024, 2029.

Finally, we must comment on the dissenter's "floodgate" arguments that our opinion will generate an unreasonable burden on the services. 44 MJ at 451 [App., *infra*, 21a-22a]. Apart from the speculative nature of such an argument, we think that it is just as likely that polygraph evidence will prevent needless litigation by avoiding some meritless prosecutions



as well as smoking out bogus claims of innocent ingestion. Furthermore, we are unaware of any such flood of polygraph cases after our decision in *United States v. Gipson*, *supra*. Finally, our measure should be the scales of justice, not the cash register.

#### Decision

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989), will apply.

Chief Judge COX and Senior Judge EVERETT concur.

#### SULLIVAN, Judge (dissenting):

I dissent for the reasons stated in my separate opinion in *United States v. Williams*, 43 MJ 348, 356-57 (1995) (Sullivan, C.J., concurring in the result).

#### CRAWFORD, Judge (dissenting):

We have held that "[t]he defendant has the right to present legally and logically relevant evidence at trial." *United States v. Woolheater*, 40 MJ 170, 173 (CMA 1994). But as all the Judges of this Court agreed in *Woolheater*, this is "not [an] absolute" right, *id.*; see also *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017, 2026 (1996); and may yield to valid "policy considerations," 40 MJ at 173; *id.*; *United States v. Bins*, 43 MJ 79, 83 (1995) (citing *Woolheater*, 43 MJ at 84); *United States v. Schaible*, 11 USCMA 107, 111, 28 CMR 331, 335 (1960).

None of the cases cited by the majority hold that there is a constitutional right to admit an exculpatory polygraph examination. Assuming polygraphs are relevant and reliable, there is ample justification for Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.). This justification satisfies the provisions of Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a), that the rules of procedure and evidence "generally recognized" in federal trials be applied to courts-martial "so far as he [The President] considers practicable."

Through dicta and implicit holdings the Supreme Court has signaled that there is no constitutional right to introduce polygraph evidence. Exclusion of exculpatory evidence does not contravene fundamental "principle[s] of justice . . . rooted in the traditions and conscience of our" society. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

In *McMorris v. Israel*, 643 F.2d 458 (1981), the Court of Appeals for the Seventh Circuit stated that "polygraph evidence [may be] materially exculpatory within the meaning of the Constitution." 643

F.2d at 462. In dissenting to the denial of *certiorari* in that case, then-Justice Rehnquist characterized *McMorris* as a "dubious constitutional holding." *Israel v. McMorris*, 455 U.S. 967, 970 (1982).

In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995), the Court summarily denied habeas corpus for the prosecution's failure to disclose information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The basis for the defense allegation was that the prosecution failed to reveal polygraph examinations and statements by the defendant's brother and his girlfriend, the two key prosecution witnesses at trial.<sup>1</sup> These polygraphs and their statements would have undermined the witnesses' testimony at trial and supported the defense theory.

The defendant's brother testified at trial that, while he and his brother sat in the car in the laundromat parking lot, the defendant said "that he intended to rob the laundromat and 'leave no witnesses.'" The prosecution offered evidence that both the brother and girlfriend left a short while later and went to the girlfriend's house. The girlfriend also testified that when the defendant arrived at her house, he told her that he "put two bullets in the kid's head." She also heard the defendant "say that he intended to leave no witnesses." 116 S.Ct. at 8-9.

At trial the defendant testified that he forced the attendant "to lie down on the floor." While removing the cash, he "accidentally fired" a bullet into the victim's head. The defendant "denied telling" his brother

<sup>1</sup> This Court in the past has looked at *Brady v. Maryland*, 373 U.S. 83 (1963), and its military counterpart as to its impact on prosecution witnesses as in *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and reversed a conviction. *United States v. Simmons*, 38 MJ 376, 380-82 (CMA 1993).

and the girlfriend "that he intended to leave no witnesses." Moreover, he said that his brother "assisted" him. 116 S.Ct. at 9.

Under Washington State law, polygraph evidence is inadmissible. *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984). Even so, prior to trial, the prosecution requested that the two key witnesses take a polygraph examination. The polygrapher noted that the girlfriend's answers to the "questions were inconclusive." The polygrapher asked the defendant's brother whether (1) he had "assisted" in the robbery, and (2) whether at any time he was with his brother in the laundromat. The examiner said that his negative responses showed "deception." The prosecution did not disclose these examinations to defense counsel. 116 S.Ct. at 9. In denying relief because of failure to disclose the polygraph examinations, the Supreme Court noted that, during the habeas corpus hearing, "counsel obtained no contradictions or admissions" from the defendant's brother. 116 S. Ct. at 11. Clearly, if polygraph examinations were admissible, polygraph results would have impeached the witnesses. *Thus, the results on appeal would have been different.*

The implicit holding in *Wood* has been reinforced in *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996). In *Egelhoff* the Supreme Court held that a state may exclude evidence of voluntary intoxication as it relates to the *mens rea* element of a criminal offense. When interpreting Supreme Court decisions, it is instructive and helpful to look beyond the specific holding to the debate of broader principles of jurisprudence.

In *Egelhoff*, eight Justices agreed that there may be valid policy reasons to exclude relevant, reliable



evidence. 116 S. Ct. at 2017, 2026. While the eight Justices debated the “*Chambers principle*,” *id.* at 2022, Justice Ginsburg, concurring in the judgment, looked “[b]eneath the labels” in concluding that a state legislature’s redefinition of *mens rea* “encounters no constitutional shoal.” *Id.* at 2024.

Justice Scalia, speaking for four other Justices, described *Chambers* as a “highly case-specific error correction” case as well as a “fact-intensive case.” He concluded that there is no violation of a defendant’s right to defense “whenever ‘critical evidence’ favorable to him is excluded”; on the other hand, “erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.” *Id.* at 2022. The plurality then emphasized that Fed.R.Evid. 403 and 802 result in exclusion of relevant, reliable evidence. *Id.* at 2017.

Justice O’Connor, dissenting and joined by three other Justices, agreed the “defendant does not enjoy an absolute right to present evidence relevant to his defense.” *Id.* at 2026. Her dissent rejected the plurality argument that because evidence of voluntary intoxication was excluded at common law, it should be excluded in this case. *Id.* at 2029-31. Justice O’Connor asserted that to exclude the evidence would prohibit a defendant from having a “fair opportunity to put forward his defense.” *Id.* at 2031. She emphasized that this concept was “universally applicable.” *Id.* at 2030. In any event, she concluded that the state had not set forth “sufficient justification,” *id.* at 2027, to exclude involuntary intoxication to negate the mental element of a defense. She agreed with Justice Ginsburg that a state could redefine an offense to render “voluntary intoxication irrelevant,”

but concluded that the State of Montana did not evidence such an intent. *Id.* at 2031. Justice O’Connor also rejected the plurality characterization of *Chambers*. *Id.* at 2026-27.

Justice Souter agreed that the “plurality opinion convincingly demonstrates that . . . the common law . . . rejected the notion that voluntary intoxication might be exculpatory, or was at best in a state of flux. . . .” *Id.* at 2032 (citation omitted). Thus, a state may “exclude even relevant and exculpatory evidence if it presents a valid justification for doing so.” *Id.* at 2032.

However, in separate opinions, Justices Breyer and Souter stated that the State of Montana had not provided for exclusion of voluntary intoxication from the *mens rea* element of an offense. In summary, in *Egelhoff* eight Justices of the Court recognized that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so.

Mil.R.Evid. 707 was “based on several policy grounds.” The policy grounds set forth in the Analysis are not exclusive. These grounds include the risk of being treated with “near infallibility”; “danger of confusion of the issues”; and waste of time on collateral matters. Drafters’ Analysis, Manual, *supra* (1995 ed.) at A22-48.

An additional policy concern is the impact in terms of practical consequences. Unfortunately, the majority overlooks the practical consequences of its decision on a worldwide system of justice. Our Court sees the cases that are at the end of a long funnel. There are approximately 4,000 general courts-martial per year. Annual Report, 39 MJ CXLVII, CLIX, CLXXIV, CLXXVII (1992-93). However, across the services, there are approximately 100,000 criminal actions per



year. Statistically more than 20 percent of these involve drug cases like the present case. The majority fails to recognize that a concomitant right of presenting polygraph evidence is the right to demand a polygraph examination during the investigative stage. This may well impose a practical impossibility on the services. Additionally, if an individual were accused of a minor crime for which she was to be given a captain's mast, she could claim a right to a polygraph examination.<sup>2</sup> Thus, the practical policy consequences set forth in the analysis established a valid governmental interest in precluding admissibility of polygraph examinations. This rule is not inconsistent with the rule in the Federal courts.

Professors Giannelli and Imwinkelried state, "A majority of jurisdictions follow the traditional rule, holding polygraph evidence inadmissible per se." P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-3 (A) at 232 (2d ed. 1993 and 1995) (citing many cases). Further, "[a] substantial minority of courts admit polygraph evidence upon stipulation of the parties." *Id.* § 8-3(B) at 236. But "[a] few courts recognize a trial court's discretion to admit polygraph evidence even in the absence of a stipulation." *Id.* § 8-3(C) at 240.

While the Federal courts are split as to admissibility of polygraphs, some, like *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995), have admitted poly-

<sup>2</sup> See, e.g., *United States v. Bass*, 11 MJ 545 (ACMR 1981) (refusal to accept Article 15 resulted in a general court-martial and 8 years' confinement. There have been other instances where Article 15a have resulted in more serious dispositions. See, e.g., *United States v. Brock*, No. 96-0673, *pet. granted* (July 12, 1996); *United States v. Zamberlan*, 44 MJ 69 (1996).

graph evidence at suppression hearings or pursuant to a stipulation. *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989). This is not unlike admitting hearsay at suppression hearings. In any event, the Federal courts have not faced the issue of a rule precluding admissibility of polygraph evidence in a worldwide system of justice. California, which does have a rule similar to the military and applies the *Kelly-Frye* (so named after *People v. Kelly*, 549 P.2d 1240 (Cal. 1976), and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) test, has held that there is no constitutional right to introduce exculpatory polygraph examinations. See, e.g., *People v. Kegler*, 197 Cal. App. 3d 72, 84-90, 242 Cal. Rptr. 897, 905-09 (1987).

Since Mil.R.Evid. 707 is based on valid policy grounds, it satisfies the Constitution and the requirement in Article 36(a) that the rules of procedure and rules of evidence conform to those in Federal trials "so far as he [The President] considers practicable." If one carried the view of the majority to its logical conclusion, it calls into question various procedural and evidentiary rules. See, e.g., Mil.R. Evid. 502-12 and 803(6); RCM 305(h)(2)(B). Unfortunately this path reminds me of earlier forays by this Court. See, e.g., *United States v. Larnear*, 3 MJ 76, 80, 83 (1977); *United States v. Heard*, 3 MJ 14, 20 n.12 (1977); *United States v. Hawkins*, 2 MJ 23 (1976); *United States v. Washington*, 1 MJ 473, 475 n.6 (1976). But see *United States v. Newcomb*, 5 MJ 4, 7 (CMA 1978) (Cook, J., concurring).

To the extent the majority suggests that *Egelhoff* is distinguishable because it involves a legislative act rather than rulemaking by an executive, I have two responses. First, just as the Supreme Court treats

Federal Rules of Criminal Procedure the same as statutes, so should we. *See, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Second, in *Loving v. United States*, 116 S. Ct. 1737, 1748 (1996), the Supreme Court recognized that the President as Commander-in-Chief has been delegated "wide discretion and authority." The Court upheld the delegation of authority to the President to promulgate aggravating factors in a death penalty case. *Loving* left open the question the extent of The President's authority under Article 36 alone. *Id.* at 1749.

For the aforementioned reasons, I dissent.

## APPENDIX B

UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS

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ACM 30304  
5 January 1995

UNITED STATES

v.

AIRMAN EDWARD G. SCHEFFER, FR554-85-0300  
United States Air Force

---

EN BANC

DIXON, SNYDER, RAICHLE, HEIMBURG,  
YOUNG, PEARSON, SCHREIER, GAMBOA,  
and BECKER

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OPINION OF THE COURT

YOUNG, Judge:

Contrary to his pleas, appellant was convicted of making and uttering 17 checks, totaling over \$3,300 without sufficient funds in his account, wrongfully using methamphetamine, failing to go to his appointed place of duty, and a 13-day unauthorized absence. Articles 123a, 112a, and 86, UCMJ, 10 U.S.C. §§ 923a, 912a, 886 (1988). Court members sentenced

him to a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to E-1. Appellant assigns three errors: (1) the military judge erred by refusing to admit into evidence the results of appellant's exculpatory polygraph examination; (2) the charges should have been dismissed for lack of a speedy trial; and (3) appellant is entitled to 5 days credit because his pretrial confinement was not reviewed by a neutral and detached magistrate within 48 hours of incarceration. We order appellant be given credit for 1 day of illegal pretrial confinement. We find no error which affects the findings or sentence.

## I. Admissibility of Polygraph Results

### A. Facts

Appellant, apparently on his own initiative, agreed to assist the Air Force Office of Special Investigations (AFOSI) with drug investigations. His AFOSI handlers advised appellant that from time to time they would ask him to provide urine specimens to be tested for drugs and to submit to polygraph examinations. On 7 April 1992, AFOSI Special Agent Shilaikis asked appellant if he would consent to a urinalysis. Appellant agreed, but declined to provide a urine sample until the following day. He claimed he only urinated one time a day, and he had already done so. He asked for, and received, permission to continue his undercover work that evening. The following day, he provided a urine specimen. On 10 April 1992, appellant took an AFOSI polygraph. During the examination, appellant answered "no" to the following relevant questions:

- (1) Since you've been in the AF, have you used any illegal drugs?
- (2) Have you lied about any of the drug information you've given OSI?
- (3) Besides your parents, have you told anyone you're assisting OSI?

The examiner opined that appellant's polygraph charts "indicated no deception to the above questions." On approximately 14 May 1992, the AFOSI agents learned appellant's urine specimen had tested positive for methamphetamine.

### B. The Issue

At trial, appellant moved to admit the results of the polygraph despite the proscription of Mil. R. Evid. 707; the prosecution objected. The military judge ruled that the Constitution did not prohibit the President from promulgating a rule excluding polygraph evidence from admission in trials by courts-martial, and he denied appellant's request to lay a foundation for its admission. Appellant testified on his own behalf and denied knowingly using methamphetamine.

Mil. R. Evid. 707 provides:

- (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
- (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.



According to the drafters' analysis, Mil. R. Evid. 707 is based on the following policy grounds: (1) the "danger court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility'" (quoting *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975)); (2) "to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted'" (*Id.*); (3) the danger of confusion of the issues which "could result in the court-martial degenerating into a trial of the polygraph machine"; (4) presentation of polygraph evidence "can result in a substantial waste of time when collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; (5) "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system." *Manual for Courts-Martial, United States*, 1984, App. 22 at A22-46 (1994 ed.); see *United States v. Helton*, 10 M.J. 820 n.10 (A.F.C.M.R. 1981) (concise description of the complex combination of theory, precise measurement techniques, and subjective interpretation required to support validity of polygraph).

C. *Presidential Authority to Promulgate Mil. R. Evid. 707(a)*

The Constitution vests in Congress the power to make rules "for the Government and Regulation of the land and naval forces." U.S. Const. art. I, § 8,

cl. 14. The Constitution also gives Congress the power to make all laws necessary to execute this power. U.S. Const. art. I, § 8, cl. 18. Congress executed this power by enacting the Uniform Code of Military Justice (UCMJ). In the UCMJ, Congress delegated to the President the authority to prescribe the modes of proof before trials by courts-martial, "in regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]." Article 36(a), UCMJ, 10 U.S.C. § 836(a) (1994). Article 36(a) is unquestionably a valid Congressional delegation. See *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118-19 (1962); accord *United States v. Weiss*, 36 M.J. 224, 238 (C.M.A. 1992) (Crawford, J., concurring in the result), *aff'd*, — U.S. —, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).

Pursuant to Article 36(a), UCMJ, the President promulgated Mil. R. Evid. 707, and the Manual for Courts-Martial in which it is found. See Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991). Thus, the question we must resolve is rather narrow in scope. It is not whether polygraph examinations should be admissible in trials by courts-martial, but whether the President may constitutionally prohibit their admission.

"[O]ne of the first principles of constitutional adjudication [is the] basic presumption of the constitutional validity of a duly enacted state or federal law." *Lemon v. Kurtzman*, 411 U.S. 192, 208, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60,

93 S. Ct. 1278, 1311, 36 L. Ed. 16 (1973) (Stewart, J., concurring)). We must accord Mil. R. Evid. 707, and all other provisions of the Manual for Courts-Martial, the force of law, unless it conflicts with the UCMJ. *Noyd v. Bond*, 395 U.S. 683, 692, 89 S. Ct. 1876, 1882, 23 L. Ed. 2d 631 (1969); *Smith*, 32 C.M.R. at 119. Accordingly, we will not declare Mil. R. Evid. 707(a) unconstitutional in the absence of a clear showing that the President exceeded the discretionary powers conferred upon him by Article 36(a). *United States v. White*, 3 U.S.C.M.A. 666, 14 C.M.R. 84, 88 (1954).

*D. The Rights to Due Process and Compulsory Process*

Military members are afforded the protections by the United States Constitution, except for those which are expressly or by necessary implication inapplicable. *United States v. Stombaugh*, 40 M.J. 208, 211-12 (C.M.A. 1994). Both the right to due process under the Fifth Amendment and the right to compulsory process under the Sixth Amendment apply to service members at courts-martial. *Stombaugh*, 40 M.J. at 212; *United States v. Graf*, 35 M.J. 450, 454 (C.M.A. 1992), *cert. den.*, — U.S. —, 114 S. Ct. 917, 127 L. Ed. 206 (1994).

The Supreme Court has held that evidence is constitutionally required if it is relevant, material, and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The Court of Military Appeals has “unequivocally” adopted this holding for military cases. *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (citing *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983)).

The Military Rules of Evidence have combined the common law concepts of relevance and materiality into one rule of relevancy. See S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 422 (3d ed. 1991).

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Mil. R. Evid. 401. But, in analyzing relevance, we still must confront two questions: (1) Does the evidence have any tendency to make the existence of any fact more or less probable?; and (2) Is that fact of consequence to a determination of appellant’s guilt?

What “favorable to the defense” means has been the subject of varying opinions; however, the Supreme Court specifically rejected the “conceivable benefit” test. “If we require only a showing that a witness could provide some ‘conceivable benefit’ to the defense, then ‘the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.’” *Williams*, 37 M.J. at 361 (Gierke, J., concurring) (quoting *Valenzuela-Bernal*, 458 U.S. at 866-67, 102 S. Ct. at 3446). It appears the Supreme Court requires that the evidence be “vital to the defense” when “evaluated in the context of the entire record.” *Valenzuela-Bernal*, 458 U.S. at 867-68, 102 S. Ct. 3446-47.

“Of course, the right to present relevant testimony is not without limitation. The right ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’” *Rock v.*



*Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed. 2d 297 (1973)). Procedural and evidentiary rules to control the presentation of evidence which are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence" are permissible. *Chambers*, 410 U.S. at 302, 93 S. Ct. at 1049; see *Washington v. Texas*, 388 U.S. 14, 23 n.21, 87 S. Ct. 1920, 1925 n.21, 18 L. Ed. 2d 1019 (1967). But, when the rule denies or significantly diminishes appellant's right to present evidence or to confront and cross-examine the witnesses against him, the competing interests must be closely examined. *Chambers*, 410 U.S. at 295, 93 S. Ct. at 1046 (citing *Berger v. California*, 393 U.S. 314, 315, 89 S. Ct. 540, 541, 21 L. Ed. 508 (1969)). As *Rock*, *Chambers*, and *Washington* are the most relevant Supreme Court cases to this inquiry, we will examine them in some detail.

#### *E. The Case Law*

Washington was convicted of murdering his former paramour's new boyfriend. Washington testified that a man named Fuller actually did the shooting and that he had tried to stop Fuller. Fuller, who had already been convicted of the murder, would have corroborated Washington's testimony, but his testimony was barred under Texas law. Two Texas statutes provided that persons charged or convicted as co-participants in the same crime could not testify for one another. The Supreme Court held that Washington was "denied his right to have compulsory process for obtaining witnesses in his favor because the State

arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23, 87 S. Ct. at 1925. The exclusion of this testimony was clearly arbitrary because it applied only to the defense, did not apply if the accomplice had been acquitted at his own trial, and "leaves [the accomplice] free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie." *Id.*

Chambers was convicted of murdering a policeman, Officer Liberty. McDonald, who was at the scene of the shooting, provided Chambers' attorneys with a signed, sworn confession to shooting the policeman with his own pistol which he subsequently discarded. McDonald also admitted to telling a friend that he had done the shooting. McDonald later repudiated his confession. At trial, a friend of McDonald testified that he saw McDonald shoot the victim. A cousin of the victim testified that right after the shooting he saw McDonald with a pistol in his hand. When the State chose not to call McDonald, Chambers did. McDonald admitted confession to the murder and his written confession was introduced. On cross-examination by the State, McDonald stated that he had recanted, he did not commit the murder, and he had only confessed because of promises that he would not go to jail and would share in a sizable tort recovery. The judge denied Chamber's motion to examine McDonald as an adverse witness because the State's "voucher" rule prevented a party from impeaching its own witness.



Chambers called three of McDonald's friends to testify. Hardin testified that on the night of the murder, McDonald admitted killing the victim. The judge sustained the State's objection that the testimony was hearsay and told the jury to disregard it because the State did not recognize declarations against penal interests as an exception to the hearsay rule. Turner testified, contrary to McDonald, that he was not with McDonald at the time of the shooting. The judge sustained the prosecution's hearsay objection to Turner's testimony that McDonald had admitted shooting the victim and had later asked Turner not to implicate him in the murder. Carter had been McDonald's friend for about 25 years. The day after the murder, McDonald told Carter he had killed Officer Liberty and disposed of the weapon. The judge refused to permit Carter to testify before the jury. Thus, as a result of the "party witness" or "voucher" rule and the State's hearsay rule, Chambers was "unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity." *Chambers*, 410 U.S. at 294, 93 S. Ct. at 1045. The Supreme Court held that Chambers was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment because (1) the application of the "voucher" rule deprived him of the opportunity to contradict testimony that was clearly adverse, and (2) the trial judge erred by excluding reliable, corroborated, hearsay evidence critical to Chambers' defense. The Court made clear that such rules of evidence were not per se unconstitutional. They are unconstitutional only to the extent their application denies an accused a fair trial.

Rock shot her husband to death. When police arrived on the scene, Rock told them her husband had choked her and thrown her against the wall, she had picked up the pistol, appellant hit her again, and she shot him. Because she could not remember the exact details of the shooting, Rock's attorney suggested she submit to hypnosis in order to refresh her memory. During the two hypnosis sessions, Rock did not relate any new information; however, after the hypnosis, she remembered that her finger was not on the trigger, and the gun had discharged when her husband grabbed her arm during the scuffle. As a result, the pistol was examined by an expert who opined that the gun was defective and prone to fire when hit or dropped. The Arkansas rules of evidence barred all testimony that had been hypnotically refreshed. Upon motion by the prosecution, the judge limited Rock's testimony to the sketchy notes the hypnosis expert had made of her pre-hypnosis description of the shooting. The Supreme Court held that a per se rule which resulted in excluding the testimony of a hypnotically refreshed accused impermissibly infringed the right of an accused to testify on her own behalf. *Rock*, 483 U.S. at 62, 107 S. Ct. at 2714. The Court declined to express an opinion as to the constitutionality of a rule that would prohibit the hypnotically refreshed testimony of witnesses other than criminal defendants. *Rock*, 483 U.S. at 58 n.15, 107 S. Ct. at 2712 n.15.

In the early years of the UCMJ, the per se exclusion of polygraph evidence was established by case law. See *United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138, 144 (1955); *United States v. Pryor*, 2 C.M.R. 365, 370-71 (A.B.R. 1951). No doubt based on this early case law, the President prohibited the

admission into evidence of conclusions based upon polygraph tests in the *Manual for Courts-Martial, United States, 1969 (Rev.)*, ¶ 142e. See Department of the Army Pamphlet 27-2, *Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition*, at 27-14 (1970). On 12 March 1980, the President substituted the Military Rules of Evidence for the evidentiary rules formerly contained in Chapter XXVII of the *Manual for Courts-Martial*. Exec. Order 12198, 45 Fed. Reg. 16,945 and 16,993 (1980). The new rules, based on the Federal Rules of Evidence, did not prohibit polygraph evidence and provided a new way of looking at expert evidence. See *United States v. Gipson*, 24 M.J. 246, 250-52 (C.M.A. 1987); accord *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, — U.S. —, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Gone was the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which required the proponent of scientific evidence to establish, as a foundation, that the evidence was of a type generally accepted in the scientific community. In its place, the President promulgated Mil. R. Evid. 401, 402, 403, and 702. See *United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993); *Gipson*, 24 M.J. at 251. To be admissible, the scientific evidence must be relevant (Mil. R. Evid. 401 and 402); its probative value must not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Mil. R. Evid. 403); and must "assist the trier of fact to understand the evidence or to determine a fact in issue" (Mil. R. Evid. 702). Of course, in evaluating whether the evidence is probative and

helpful to the fact finder, the military judge should consider the degree of acceptance in the scientific community. *Gipson*, 24 M.J. at 252.

In *Gipson*, the Court of Military Appeals divided scientific evidence into three classes: (1) evidence for which "the principles underlying the expertise are so judicially recognized that it is unnecessary to reestablish those principles in each and every case, such as fingerprint, ballistics, or x-ray evidence; (2) evidence for which the principles can neither be accepted nor rejected out of hand; and (3) evidence based on practices and techniques that "have been so universally discredited that a trial judge may safely decline even to consider them, as a matter of law." *Gipson*, 24 M.J. at 249. The Court assigned the polygraph to the middle class and specified several reasons which precluded assigning it to the top class of scientific evidence: (1) criticism of the scientific principles on which the polygraph and the polygrapher's opinion is based; (2) the importance of the precision of the questions, the way the examiner intended them, and the examinee understood them; (3) the examinee's state of mind; and (4) other conditions such as whether the examinee was taking medications, illegal drugs, or attempting countermeasures to control the physical responses to be recorded by the polygraph. *Gipson*, 24 M.J. at 248-49; see 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence*, § 8-3(A) (2d ed. 1993) (the authors' formulation of the issues: "the lack of empirical validation, the numerous uncontrollable factors involved in the examination, the subjective nature of the deception determination, and the absence of adequate standards for assessing the qualifications of examiners."); *Helton*.



Despite the Court's concern, it held that polygraph evidence was not per se inadmissible and an accused is entitled to attempt to lay foundational predicates for its admission. Of course, admissibility would depend on the competence of the examiner, the suitability of the examinee, the nature of the particular process employed, and other factors. *Gipson*, 24 M.J. at 252-53. By adopting Mil. R. Evid. 707, the President overruled *Gipson* as it applied to polygraph evidence.

The President promulgated Mil. R. Evid. 707 on June 27, 1991, to apply to all cases in which arraignment had been completed on or after 6 July 1991. Exec. Order 12,767, 56 Fed. Reg. 30,284 (1991). The Army Court of Military Review is the only appellate court to have directly addressed the constitutionality of this rule. See *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994). In *Williams*, the accused admitted misappropriating three of eighteen unauthorized disbursements from the Chaplain's Fund and "passed" a polygraph exam which focused on other unauthorized disbursements. Williams claimed that the trial court's decision not to admit the polygraph evidence "impacted greatly" on his decision not to testify before findings. But see *Gipson*, 24 M.J. at 253 (Court of Appeals "would not condone [the admission of] such opinion testimony absent the examinee's consistent testimony"). Nevertheless, the Army Court examined the reasons the drafters gave for the rule. The Court found several of those reasons to be "in the nature of matters that are routinely resolved by trial judges under Mil. R. Evid. 403," and the final reason (concerns about reliability) to be "in its worst light, disingenuous, and at best incongruous

with the substantial investment the Department of Defense has made, and continues to make in polygraph examinations—not to mention the observation in *Gipson* that "[t]he greater weight of authority indicates that [the polygraph] can be a helpful scientific tool.'" *Williams*, 39 M.J. at 555 (quoting *Gipson*, 24 M.J. at 249). Based on its reading of *Washington*, *Chambers*, and *Rock*, the Court went on to hold, "under the facts presented," the appellant's

Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard of these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil. R. Evid. 707.

*Williams*, 39 M.J. at 555. Although the Army Court appears to have restricted its opinion to the facts of the case, we are unable to discern what circumstances would trigger a different result.

#### F. Analysis

We believe the case law suggests a framework for examining constitutional challenges to rules of evidence which prohibit an accused from presenting evidence:

- (1) The testimony must be relevant under Mil. R. Evid. 401 and 402 and vital to the defense when evaluated in the context of the entire record. If the evidence is either irrelevant or not vital to the defense, there is no constitutional right to present it.



(2) The rule of evidence may not *arbitrarily* limit the accused's ability to present reliable evidence.

(3) If the rule permits the admission of the evidence for some purpose, but not for others, it may not *arbitrarily* limit admission by the defense to a greater degree than by the prosecution.

(4) The rule of evidence must not *arbitrarily* infringe on the right of the accused to testify on his own behalf.

Applying these principles, we hold that the President's prohibition of the admission of polygraph evidence in Mil. R. Evid. 707(a) was a constitutionally permissible exercise of his Article 36(a), UCMJ, authority to prescribe modes of proof for trials by courts-martial.

(1) The Court of Military Appeals has held that polygraph evidence may be relevant to the credibility of a witness. We will assume appellant's credibility was relevant and vital to his defense. See *Rodriguez*, 37 M.J. at 452; *Gipson*. However, we do not believe presentation of polygraph evidence was vital to the court member's assessment of appellant's credibility.

(2) Mil. R. Evid. 707 does not arbitrarily limit the accused's ability to present reliable evidence.

(a) A rule is arbitrary if it is "determined by chance, whim, or impulse, and not by necessity, reason, or principle." *The American Heritage Dictionary of the English Language* 94 (3d ed. 1992). The President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning. The Court of Military Appeals noted still

valid concerns about the soundness of the underlying principles of the technique and the reliability of any particular polygraph evidence. *Gipson*, 24 M.J. at 248-49. That is why the Court assigned polygraph results to the middle class of scientific evidence. The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the probative value of the evidence. See *Helton*, 10 M.J. at 824 n.15 (citing *United States v. Urquidez*, 356 F. Supp. 1363 (C.D. Cal. 1973) (experience of District Judge in hearing 3 days of foundational evidence)).

(b) We are unwilling to follow the Army Court of Military Review's holding in *Williams*. The fact that military judges are often called upon to resolve issues similar to some of the concerns expressed by the drafters of Mil. R. Evid. 707, or that the Department of Defense uses the polygraph as an investigative tool, does not bar the President from determining that the probative value of polygraph evidence is substantially outweighed by other more compelling factors. The *Gipson* decision made sense in the absence of a rule prohibiting the admission of polygraph evidence. The Court of Military Appeals established the method for resolving the admission of all manner of scientific evidence, not just polygraph evidence—let the military judge hold an evidentiary hearing and render a decision. But, we believe the drafters' concerns for admitting evidence are significant enough for the President, exercising his Article 36(a), UCMJ, authority, to formulate a rule of evidence excluding it from courts-martial.

(c) "The first case to reject the admissibility of polygraph results was *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." *Gipson*, 24 M.J. at 250. Over the years since *Frye*, the admissibility of polygraph evidence has been continually litigated in the federal courts, both on direct appeal and in *habeas corpus* actions. Nevertheless, we have been unable to locate any federal case, before or after the promulgation of the Federal Rules of Evidence, which suggests that the federal rule, or any similar state rule, unconstitutionally interferes with an accused's rights to due process or to present a defense.

(d) Furthermore, Mil. R. Evid. 707 applies a rule of evidence generally recognized by the federal courts. While not a part of the Federal Rules of Evidence, most of the federal circuit courts of appeal still hold that polygraph evidence cannot be introduced into evidence to establish the truth of statements made during the polygraph examination. See *United States v. Bounds*, 985 F.2d 188, 192 n.2 (5th Cir. 1993); *United States v. A & S Council Oil Co.*, 947 F.2d 1128 (4th Cir. 1991); *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988); *United States v. Bowen*, 857 F.2d 1337 (9th Cir. 1988); *United States v. Hall*, 805 F.2d 1410, 1416 (10th Cir. 1986); *United States v. Cardarella*, 570 F.2d 264 (8th Cir. 1978); see also *United States v. Rea*, 958 F.2d 1206, 1224 (2d Cir. 1992) (Court had "intimated in past" that results not admissible, so trial judge did not abuse his discretion in ruling that polygraph was not sufficiently reliable to warrant admission); *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (trial judge has discretion to admit polygraph evidence when both parties stipulate in advance as to circumstances of the test and the scope of admissibility and, subject to

three preliminary conditions, to impeach or corroborate the testimony of a witness at trial. The three conditions are: adequate notice to opposing party, opposing party given reasonable opportunity to have subject tested by own expert using substantially the same questions, and whether used to impeach or corroborate, admissibility is governed by the Federal Rules of Evidence, including Fed. R. Evid. 608. "Even where the above three conditions are met, admission of polygraph evidence for impeachment or corroboration purposes is left entirely to the discretion of the trial judge." 885 F.2d at 1536).

(e) While it might be arbitrary for the President to promulgate a rule which prohibits the admission of evidence which is assigned to the top scientific class, such as fingerprint evidence, we do not believe it is arbitrary to prohibit those techniques which fall into the middle or bottom classes, which by definition are less reliable. See *Gipson*, 24 M.J. at 249.

(3) The Mil. R. Evid. 707(a) prohibition on the admission of evidence is comprehensive and equally applicable to both the prosecution and the defense.

(4) Mil. R. Evid. 707(a) did not infringe on the right of the accused to testify on his own behalf.

We believe Mil. R. Evid. 707 is a permissible rule "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302, 93 S. Ct. at 1049. We, therefore, reject the Army Court's reasoning in *Williams* and hold that Mil. R. Evid. 707 did not unconstitutionally infringe on appellant's rights to due process and to present a defense. Accordingly, the military judge did not err in preventing appellant from laying a foundation for the admission of polygraph evidence.



## II. *County of Riverside v. McLaughlin* Credit

On 13 May 1992, near Centerville, Iowa, an Iowa State Police officer apprehended appellant for speeding and driving on a suspended license. Appellant told the officer he was on leave from March Air Force Base. The officer called the squadron and discovered that appellant was absent without leave. The squadron first sergeant asked the officer to detain appellant until military personnel could escort him back to the base. On 15 May, a military escort accompanied appellant back to March Air Force Base, where appellant's commander ordered him into pretrial confinement at 0030, 16 May. On 18 May, the commander completed a written memorandum, in accordance with R.C.M. 305(h)(2), concluding there was probable cause to believe appellant committed several named offenses under the UCMJ, and determining that continued pretrial confinement was necessary. On 20 May, the area defense counsel asked for a delay until 28 May in the pretrial confinement hearing to be conducted by a military magistrate. On 28 May, the military magistrate conducted the hearing and ordered appellant's confinement continued.

A person arrested without a warrant must "be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention." *United States v. Rexroat*, 38 M.J. 292, 294 (C.M.A. 1993) (citing *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)), *cert. denied*, — U.S. —, 114 S. Ct. 1296, 127 L. Ed. 2d 648 (1994). "[P]robable cause determinations made after 48 hours of arrest are presumptively untimely," and "the burden shifts to the government to demonstrate the existence

of a bona fide emergency or other extraordinary circumstance.'" *Rexroat*, 38 M.J. at 294 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 1670, 114 L. Ed. 2d 49 (1991)). "If military exigencies prevent completion of probable-cause review within 48 hours, the fact of these exigencies may be used to rebut the presumption." *Rexroat*, 38 M.J. at 295-96. If the commander's probable cause determination, made under either R.C.M. 305(d) or (h), is made within 48 hours, and the commander is neutral and detached, then *Gerstein* and *McLaughlin* are satisfied. *Rexroat*, 38 M.J. at 298.

We first must decide when the *McLaughlin* 48 hours started to run—upon appellant's apprehension in Iowa or some later time. The Court of Military Appeals has ruled that the 48 hours starts at the time the commander actually orders the service member into pretrial confinement, not the time he was taken into custody. *Rexroat*, 38 M.J. at 295. When the accused's official custody is not at the direction of military authority and the military makes reasonably diligent efforts to secure physical custody over him and order him into pretrial confinement, we believe it does not make sense to start the clock until the commander actually orders him into pretrial confinement. Thus, we consider the 48-hour clock to have started at 0030, 16 May 1992. Even if the clock started when military authority requested appellant be detained in Iowa, we believe the military exigencies of getting him back to March Air Force Base overcame the *McLaughlin* presumption that the probable cause determination was untimely. *Rexroat*, 38 M.J. at 295-96.



Next, we must determine if appellant's commander was "neutral and detached," such that either his initial confinement order or decision to continue confinement satisfies *Gerstein* and *McLaughlin*. Although the commander later preferred charges against appellant, there is no evidence of record to suggest he was "directly or particularly involved in the command's law enforcement function." *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994) (quoting *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A. 1982)); see *United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992). Therefore, we hold the commander was neutral and detached.

Finally, we must determine whether the commander had probable cause to place appellant into pretrial confinement. The prosecution did not present any evidence to show what information the commander had before him when he ordered appellant into pretrial confinement. Therefore, we are unable to conclude that, at the time he ordered appellant into pretrial confinement, the commander had probable cause to believe that appellant had committed an offense under the UCMJ, and that pretrial confinement was required by the circumstances. See R.C.M. 304(c); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976). However, we find the commander's memorandum of his decision to retain appellant in confinement, dated 18 May, amply complies with *Gerstein* and R.C.M. 305(h)(2)(B). The prosecution failed to present evidence from which we could conclude that this memorandum, or the decision on which it was based, was accomplished within 48 hours (by 0030, 18 May). Although R.C.M. 305(k) does not specifically speak to the *McLaughlin* rule, we believe it is appropriate to apply its remedies

to *McLaughlin* violations. Therefore, we hold that appellant is entitled to 1 extra day of pretrial confinement credit against his sentence. Since appellant has already served his confinement, we order the credit be converted to 1 day of total forfeitures. See R.C.M. 305(k).

### III. Speedy Trial

Appellant insists that the military judge should have dismissed the charges against him with prejudice because the prosecution failed to bring him to trial within 90 days of the initiation of his pretrial confinement. Appellant's attack is broad in scope. He claims that neither the special court martial convening authority nor the Article 32 investigating officer were authorized to grant delays for speedy trial accounting: the special court-martial convening authority because the case was referred to a general court-martial; the investigating officer because no convening authority had authorized him to grant delays. Normally, we review the military judge's rulings on speedy trial for an abuse of discretion and reasonableness. *United States v. Longhofer*, 29 M.J. 22, 28 (C.M.A. 1989). Of course, we may find the facts ourselves, if we so desire. Article 66(c), UCMJ, 10 U.S.C. §866(c) (1994).

"The accused shall be brought to trial within 120 days after the earlier of (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or, (3) Entry on active duty under R.C.M. 204." R.C.M. 707(a); see *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993) (overruling *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) and *United States v. Driver*, 23 U.S.C.M.A. 243, 49

C.M.R. 376 (1974) presumption of speedy trial violation when pretrial confinement exceeds 90 days). "All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run." R.C.M. 707(c). Regardless of the 120-day rule, the prosecution must take immediate steps to bring a confined accused to trial. Article 10, UCMJ, 10 U.S.C. § 810 (1988); *Kossman*, 38 M.J. at 262 ("reasonable diligence" suggested as appropriate standard to evaluate Article 10 mandate).

Appellant was initially apprehended on 13 May 1992 by the Iowa police for violation of Iowa law. However, since the record is unclear as to whether appellant remained in custody in Iowa because of the civilian charges or to await escorts to return him to military control, we consider his pretrial confinement, for speedy trial purposes, to have begun on 13 May 1992. See *United States v. Keaton*, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969) (date of confinement for speedy trial purposes is date incarcerated for military offense). Appellant was arraigned 154 days later—14 October 1992. At the defense request, the military judge granted a 34-day delay from 10 September to 14 October 1992. Thus, appellant was brought to trial on the 120th day under R.C.M. 707. We need not reach appellant's assertions that neither the special court-martial convening authority nor the investigating officer had the authority to grant delays in this case. We conclude the prosecution was timely under R.C.M. 707 and was pursued with reasonable diligence under Article 10, UCMJ.

#### IV. CONCLUSION

The findings and sentence are correct in law and fact, and except for the *McLaughlin* credit for which appellant will be compensated 1 day of pay and allowances, no error prejudicial to the substantial rights of appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON, Senior Judges SNYDER, RAICHLE, and HEIMBURG, and Judges GAMBOA and BECKER concur.

Judge PEARSON, joined by Judge SCHREIER, (concurring in part and dissenting in part):

Speaking for the majority in *United States v. Gipson*, Judge Cox summarized his view on the reliability of polygraph evidence:

In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion.

*Gipson*, 24 M.J. 246, 253 (1987).

If Judge Cox is right, and we think he is, this appellant was denied his constitutional right to lay



the foundation for relevant, material, and favorable exculpatory evidence vital for his defense. *See, eg., Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (accused's right to present evidence); *Gipson*, 24 M.J. at 254 app. (listing of articles and treatises on reliability of polygraphs); *McMorris v. Israel*, 643 F.2d 458, 461-462 (7th Cir. 1981) ("[W]e note that even the most ardent detractors from the validity of polygraph evidence concede a degree of reliability of 70% or higher for properly administered examinations."), *cert. denied*, 455 U.S. 967 (1982). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, — U.S. —, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (standard for admitting expert testimony under Fed. R. Evid. 702); *United States v. Garcia*, 40 M.J. 533 (A.F.C.M.R. 1994) (standard for admitting expert testimony under Mil. R. Evid. 702); *United States v. Combs*, 35 M.J. 820 (A.F.C.M.R. 1992) (same), *aff'd*, 39 M.J. 288 (1994).

Litigated urinalysis cases often present the classic man versus machine contest. There are no eye witnesses to the urinalysis based drug charge, nor any witnesses who testify the accused was somehow impaired, nor any other corroborating evidence of drug use. Likewise, there is no evidence to show where or how the accused allegedly used the drug, or a precise time of use. Instead, machines—operated by humans—produce results—interpreted by humans—which the prosecution uses to procure a conviction. In this regard, the prosecutor calls an expert witness to explain that the machine results show the accused's urine specimen contained a metabolite of a chemical compound which is found in the drug charged. Conse-

quently, the prosecution's case rests entirely on scientific evidence offered under Military Rule of Evidence 702.

Do urinalysis machines, or their operators, make "mistakes" which go undetected through normal quality control? We need only look at Pentium computer chips that can't divide, nuclear reactors that go haywire, and space shuttles that don't launch to answer that question.

So what if you are wrongfully accused of drug use based on an erroneous urinalysis result? You have no eyewitnesses to shake on cross-examination, or to help you. You have no alibi witnesses unless you are in direct observation of someone for 24 hours a day, 7 days a week, since it only takes a moment alone to snort cocaine or consume most other drugs. Because of the nebulous nature of the prosecution's evidence, you basically have only your word. But why should a judge or jury believe you, as opposed to the prosecution's "scientific" evidence, if you chose to testify? **Credibility!**

In a urinalysis case, the accused's credibility becomes the whole ball game if the accused denies use since urinalysis machines can't be cross-examined. If the court convicts, it chooses not to believe the accused, the only real witness to the offense. Thus, evidence reflecting favorably on the credibility of the accused's denial is relevant, material, and vital to the defense in a urinalysis case where the accused takes the stand, which brings us to polygraphs.

Polygraphs are also machines—operated by humans—which produce results—interpreted by humans. Polygraph evidence reflects on the credibility of an accused's denial of having used the drug charged.



*Gipson*, 24 M.J. at 253; *McMorris*, 643 F.2d at 461-2. Is it admissible on an accused's behalf—we think so in spite of the absolute prohibition in Military Rule of Evidence 707. See *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994).

We agree the President may promulgate rules of evidence for trials by court-martial. However, the President may not promulgate a rule which infringes on an accused's constitutional right to present relevant, material, and favorable evidence. See, e.g., *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988) (striking down President's rule in R.C.M. 916(k)(2) precluding accused from presenting evidence of partial mental responsibility to negate state of mind element of an offense); *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983) (recognizing constitutional limit on President's bar in Mil. R. Evid. 412(a) on admission of reputation or opinion evidence of nonconsensual sexual offense victim's past sexual behavior).

Consequently, we recognize a constitutional escape clause to Military Rule of Evidence 707, similar to that found expressly in Rule 412(b) which excludes evidence of a nonconsensual sexual offense victim's past sexual behavior. Polygraph evidence is not admissible unless it is "constitutionally required to be admitted," that is, unless it is relevant, material, and favorable to the defense. Cf. *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993) (constitutionally required evidence under Mil. R. Evid. 412). In this regard, military judges should "view liberally the question of whether the expert's testimony may assist the trier of fact." *Combs*, 35 M.J. at 826. And, "[i]f anything, in marginal cases, due process might make

the road a tad wider on the defense's side than on the Government's." *Gipson*, 24 M.J. at 252.

Here, the military judge did not afford appellant the opportunity to show his polygraph evidence met the constitutionally required criteria for admission. Consequently, we would return the record of trial to The Judge Advocate General for remand to the convening authority for a hearing on the admissibility of the proffered polygraph evidence in accordance with the procedures outlined in *United States v. Williams*, 39 M.J. at 559.

[AIR FORCE SEAL]

OFFICIAL

/s/ Alvin J. Stribling  
ALVIN J. STRIBLING  
Technical Sergeant, USAF  
Chief Court Administrator

## APPENDIX C

U.S. COURT OF APPEALS  
FOR THE ARMED FORCES

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No. 94-5006  
CMR No. 9202646

UNITED STATES, APPELLANT

v.

JAMES L. WILLIAMS, Specialist U.S. Army,  
APPELLEE

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Argued March 30, 1995

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## OPINION OF THE COURT

COX, Judge:

1. The certified issue in this case asks whether Mil. R.Evid. 707, Manual for Courts-Martial, United States, 1984 (Change 5) (1991), which purports to bar receipt at courts-martial of polygraph evidence, violates the accused's constitutional rights.

2. Mil.R.Evid. 707 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any refer-

ence to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.<sup>1</sup>

3. In the instant case the accused sought, unsuccessfully, to introduce evidence of an allegedly exculpable polygraph. In the circumstances of this case, we hold that the accused's rights were not violated and that the military judge did not err in excluding the evidence.

## I

4. The accused was charged with forging checks between August 1991 and February 1992 (12 specifications), in violation of Article 123, Uniform Code of Military Justice, 10 USC § 923, and a single specification of stealing the cumulative value of the negotiated checks, \$8,077.89—in violation of Article 121,

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<sup>1</sup> The drafters of the rules cite a variety of "policy grounds" for excluding polygraph evidence, including, allegedly: the "danger that court members will be misled by polygraph evidence" and the "danger of confusion of the issues"; the "substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; the "burden on the administration of justice that outweighs the probative value of the evidence"; and the assertion that "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges on the integrity of the judicial system." Drafters' Analysis, Manual for Courts Martial, United States, 1984, at A22-46 (1994 ed.).

UCMJ, 10 USC § 921. He pleaded not guilty to all the forgery specifications. He also pleaded not guilty to the larceny specification, but, by exceptions and substitutions, he pleaded guilty to the lesser offense of wrongful appropriation, in the amount of \$2,528.00.

5. Notwithstanding his pleas, however, a general court-martial composed of officer and enlisted members convicted the accused of all charges and specifications, as alleged. He was sentenced to a bad-conduct discharge, confinement for 3 years, total forfeitures, and reduction to E1. The convening authority approved the adjudged sentence.

6. The Court of Military Review<sup>2</sup>, however, ordered the record of trial to be remanded for an additional hearing regarding admissibility of certain polygraph evidence. 39 MJ 555, 559 (1994). Thereupon, the Judge Advocate General of the Army certified the issue set out in ¶ 41 for this Court's review.

## II

7. The Court of Military Review summarized the facts as follows:

The [accused] was a Chaplains' Fund Clerk who, along with the Fund Manager, was in charge of collecting and disbursing funds for the chaplaincy within V Corps. During the period 18 August 1991—18 February 1992, a total of eighteen unauthorized disbursements were made from the fund account. The [accused] admitted to misappropriating three of these unauthorized disbursements in 1992, which he said that he

<sup>2</sup> See 41 MJ 213, 229 n.\* (1994).

intended to repay. He denied stealing the remainder.

In July 1992, the [accused] consented to taking a Criminal Investigation Command (CID) administered polygraph test. The test centered on whether the [accused] stole from the chaplains' fund between August and November of 1991. In the polygraph examiner's opinion, there was no deception indicated when the [accused] responded "no" to questions pertaining to the tested issue. The charts created by the polygraph instrumentation were then sent to the CID's quality control center in Maryland, which opined that the test results were inconclusive.

In August 1992, upon request by the [accused], he was retested by the same CID polygrapher. A more detailed pretest interview was conducted in order to focus the [accused] so that he would not be distracted, which could cause the test to be inconclusive. After this test, the examiner again opined that the [accused] was indicating no deception when he said that he did not steal money from the chaplains' fund between August and November 1991. Unlike the previous test, the examiner sent these polygraph charts to Heidelberg for review by his immediate supervisor, who was also an experienced CID polygrapher. The supervisor agreed with the findings and forwarded the charges to quality control of Maryland. This time, quality control opined that the test indicated no deception, and went on to say that the findings of the two examiners were "strong."



The [accused] filed a motion at his court-martial to be allowed an opportunity to lay a foundation for the admission of the two exculpatory CID polygraph examinations. The military judge denied the motion, finding Mil.R.Evid. 707 to be a proper exercise of executive rule-making authority under Article 36, UCMJ, 10 USC § 836, and violative of neither the Fifth nor Sixth Amendments of the Constitution. This ruling "impacted greatly" on [accused's] decision not to testify.

39 MJ at 556-57.

### III

8. The Government's evidence at trial consisted, in part, of the accused's sworn, written, signed pre-trial statement. According to that statement, the interrogating agent asked, among other things:

Did you, without proper authority, cash checks on the account of the Chaplains [sic] Fund, V Corps, with the intent of keeping the funds for yourself?

The accused responded: "Yes."

9. The accused also conceded therein that he fraudulently made and uttered three of the checks in issue, and he identified the uses to which he put the proceeds. The balance of the statement describes in some detail the mechanics of the accused's crimes and an acknowledgment that, on March 27, 1992, he deposited \$900 into the Fund. The accused explained that he "sent for the money from a relative, to deposit the money into the Chaplains [sic] Fund ac-

count."<sup>3</sup> The statement contains no recitation suggesting that, at the time he uttered the checks, the accused only intended temporarily to deprive the rightful owner of the proceeds.

10. Additional prosecution evidence, in the form of numerous records and documents and the testimony of various investigative, banking, and Chaplains' Fund officials, showed in detail how the accused manipulated the established procedures to both perpetrate his thefts and to mask their discovery. Still further evidence documented the flowage of the proceeds of the forged checks into the accused's personal bank account.

11. The defense case consisted, in part, of the testimony of the accused's wife, wherein she attempted to explain several of the anomalous credits to their bank account. The balance of the defense case on the merits consisted of a series of character witnesses.<sup>4</sup> Notably, the accused did not testify on the merits.

<sup>3</sup> Presumably, the accused's argument that this deposit contradicted an intent permanently to deprive was undercut by evidence that he had previously been tipped off that his crimes had been detected. About a month before the accused's deposit, his supervisor "became suspect [sic] that there was some type of—something just wasn't right with the fund." The supervisor promptly notified higher authorities and, shortly thereafter, mentioned it to the accused.

<sup>4</sup> Ironically, some of these character witnesses may have proven counterproductive for the defense. The accused's company commander, for example, extolled the accused for his administrative and organizational abilities, his initiative, his being "computer literate," and his "unique ability to package things." According to the commander, "I give him a product to do, he just works magic." Considering the government evidence that the accused was able to perpetrate

## IV

12. *United States v. Gipson*, 24 MJ 246 (CMA 1987), was a case in which we considered admissibility of polygraph evidence. Gipson proffered that he had secured, at his own expense, a polygraph examiner who had tested him and, as a result, was of the opinion that he was telling the truth when he denied committing various charged drug offenses. The prosecution countered that it, too, had a witness—a government polygrapher—who had tested Gipson and had reached the opposite conclusion. The military judge declined to permit either party to introduce polygraph evidence or even to attempt to lay a foundation for its admission. The judge concluded, *inter alia*, that such evidence had not met the requisite level of acceptance in the scientific community. 24 MJ at 247.

13. The issue squarely before us was whether the judge erred in applying the “general acceptance” test of *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), or whether the relevance-helpfulness rules of Mil.R.Evid. 401-03 and 702 governed. As had several Federal Courts of Appeals before us (applying the corresponding Federal Rules of Evidence), we concluded that *Frye* was no longer the test to be applied to expert testimony. 24 MJ at 251. Passing no judgment on the ultimate admissibility of polygraph

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his offenses and avoid detection as long as he did due to a series of missing computer backup disks, missing and falsified documents, computers that had been “tampered with,” and a rash of mysterious viruses causing the office computers to crash, the evidence of the accused’s extraordinary intelligence and skills may have merely complimented the Government’s evidence.

evidence in general or on that polygraph evidence in particular, we concluded merely that the military judge applied the wrong test and that he erred in denying Gipson the opportunity to attempt to lay a foundation for admission of his polygraph evidence.

14. Later, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court laid the *Frye* test to rest—in favor of the Rules of Evidence test—as the general test for receipt of expert testimony. *Id.* at 585, 113 S.Ct. at 2793. See also *United States v. Nimmer*, 43 MJ 252 (1995); *United States v. Youngberg*, 43 MJ 379 (1995).

15. However, the holdings of *Gipson* and *Daubert* do not, in this respect, govern the instant case. The *Daubert* opinion commenced with an analysis of Fed. R.Evid. 402, which provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Emphasis added.)

16. There being no other Federal Rule of Evidence which precluded the particular type of evidence (epidemiological) offered in *Daubert* (509 U.S. at 584, 113 S.Ct. at 2792), the opinion proceeded to an analysis of Fed.R.Evid. 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,



experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For the Daubert Court, then, resolution turned on the questions of relevance and helpfulness, with the focus being on the means by which the trial judge was to determine these factors. 509 U.S. at 591-95, 113 S.Ct. at 2796-98.

17. The Gipson opinion was decided in a similar environment, as Mil.R.Evid. 707 was not yet in effect. Thus, we had to construe Mil.R.Evid. 402, which provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

(Emphasis added.) We also merely had to consider the general rules respecting relevance and helpfulness of expert testimony.

18. The advent of Mil.R.Evid. 707, however, changed things for the military. Now, rather than the Military Rules of Evidence providing a framework for analysis of relevance and helpfulness, "these rules" expressly forbid receipt of the type of evidence here in issue. Thus Daubert and Gipson, being interpretations of very different rules, no longer control analysis of admissibility of polygraph evidence in courts-martial.

19. So also, the recent spate of Federal cases applying Daubert to polygraph evidence are not germane to our inquiry. See *United States v. Posado*,

57 F.3d 428, 429 (5th Cir.1995) ("the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [*supra*]). Therefore, it will be necessary to reverse and remand to the district court for determination of the admissibility of the proffered evidence in light of the principles embodied in the Federal Rules of Evidence and the Supreme Court's decision in *Daubert*"; *United States v. Crumby*, 895 F.Supp. 1354 (D.Ariz. 1995) (improvements in accuracy of polygraph and Daubert permit defendant to introduce evidence that he passed polygraph to counter attacks on his credibility); but cf. *United States v. Lech*, 895 F.Supp. 582 (S.D.N.Y. 1995) (even assuming polygraph results are admissible under Fed.R.Evid. 702, questions calling for legal conclusions, but not underlying facts, would not assist factfinder).

## V

20. Instead, the focus becomes whether, and under what circumstances, the per se prohibition of polygraph evidence in courts-martial might violate service-members' constitutional rights. The Supreme Court has, from time to time, encountered situations in which bars to receipt of evidence have been imposed upon the criminally accused. In *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), for example, Washington sought, unsuccessfully, to call a coparticipant, Fuller as a witness. Fuller allegedly would have testified that he, not Washington, was the triggerman in the murder. Texas statutes at the time of trial precluded coparticipants from testifying for one another, but not from testifying for the State. 388 U.S. at 16-17, 87 S.Ct. at 1921-22.

21. The Court concluded that Washington was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. 388 U.S. at 23, 87 S.Ct. at 1925.

22. In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), a State "party witness" or "voucher" rule prevented Chambers from examining, as an adverse witness, a person (McDonald) who had previously confessed to committing the crime of which Chambers stood accused. Because the State had declined to call McDonald, Chambers was forced to make him his own witness. While the State, on cross-examination, was permitted to elicit McDonald's recantation of the confession, Chambers was barred from cross-examining him as an adverse witness. In addition, State hearsay rules precluded Chambers from introducing the testimony of three other persons to whom McDonald had also allegedly confessed.

23. Regarding the "voucher" rule, the Court observed:

The argument that McDonald's testimony was not "adverse" to, or "against," Chambers is not convincing. The State's proof at trial excluded the theory that more than one person participated in the shooting of Liberty [the deceased police officer]. To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers. And, in the

circumstances of this case, McDonald's retraction inculpated Chambers to the same extent that it exculpated McDonald. It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers. The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.

410 U.S. at 297-98, 93 S.Ct. at 1047 (footnote omitted).

24. Regarding the hearsay evidence, the State's declaration-against-interest exception to the rule against hearsay encompassed declarations against pecuniary interest, but not declarations against penal interest. The Court noted that the statements in question "were originally made . . . under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300, 93 S.Ct. at 1048. In addition, "McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury." 410 U.S. at 301, 93 S.Ct. at 1049.

25. Concluding that Chambers' due process rights were violated, the Court commented:



Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurance of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

410 U.S. at 302, 93 S.Ct. at 1049 (citations omitted).

26. See also *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (State law barring receipt in evidence of juvenile records and probation status of key prosecution witness violated Davis' right of confrontation by depriving him of opportunity to show witness had motive falsely to implicate Davis); *Crane v. Kentucky*, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986) (established State rule that trial court's determination regarding voluntariness of pretrial confessions is conclusive and may not be relitigated at trial denied petitioner opportunity

to attack accuracy of his purported confession and deprived him "of his fundamental constitutional right to a fair opportunity to present a defense"); *Rock v. Arkansas*, 483 U.S. 44, 58, 61-62, 107 S.Ct. 2704, 2712, 2714, 97 L.Ed.2d 37 (1987) (State's per se rule excluding all "hypnotically refreshed testimony" prevented Rock from showing that her memories might be reliable and potentially deprived her of the Fifth and Sixth Amendment right to be heard in her own defense).

## VI

27. Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused's constitutional trial rights. We conclude, however, that this is not such an appropriate case, for reasons we now address.

28. The issue of admissibility of the instant polygraph evidence was resolved at trial on the basis of proffers by the parties. The polygrapher did not testify, and no documentation of the test questions or results was presented. Nevertheless, both parties agreed that the critical "relevant" questions at the polygraph examination focused on whether the accused stole money from the chaplains' fund. The accused responded, "No," to such questions. Thus it was the accused's denial of criminality that the polygrapher was prepared to opine was true (i.e., that "no deception was indicated").<sup>5</sup>

<sup>5</sup> Of course a polygrapher's opinion cannot possibly gauge the objective truth of any statement. At best they can opine that the subject believed the statement to be true. Thus, just as multiple witnesses to an event may take away different memories and interpretations of the same physical mani-

29. Having failed to take the stand and submit himself to the crucible of cross-examination, the accused argues that he should have been permitted nevertheless to introduce this out-of-court assertion, bolstered as it was with the expert's opinion that it was truthful. Of course this statement was made expressly with a view toward trial, after the alleged commission of the offenses; and, in light of the polygraphic support, it was unabashedly offered to prove the truth of the matter asserted. In other words, the proffered evidence was not just hearsay, but super-enriched hearsay.<sup>6</sup>

30. Allowing a party, in effect, to testify by proxy—without at the same time affording the opposition an opportunity to cross-examine or the factfinder an opportunity to observe and make its own evaluation of the party's credibility—would amount to nullification of the adversary system and a throwback to a bygone and little-missed era. See 2 McCormick on Evidence §§ 244-46 at 90-99 (4th ed.1992). The constitutional rights of an the accused are designed to assure a fair trial, not to subvert the adversary process.

festation, in theory they could each pass a polygraph examination asserting their differing interpretations.

<sup>6</sup> The accused cannot capitalize on the vacuum arising from the fact that he obtained the unfavorable ruling in limine and then elected not to take the stand. In order to perfect his claim of right on appeal, it would have been necessary for him to testify or to establish some other valid evidentiary basis for admission of the hearsay evidence. *United States v. Gee*, 39 MJ 311 (CMA 1994); see *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). At trial, the accused offered no hearsay exception justifying receipt of the evidence.

31. That the expert's opinion cannot be separated from the underlying out-of-court declaration is self-evident, as the expert testimony clearly could not be offered simply to show that the accused made some truthful statement. Only when the opinion is connected with the underlying statement, explicitly or implicitly, can it have any arguable relevance to the case. We take it as obvious that when a party offers a polygrapher's opinion that a certain assertion did not indicate deception, the party is offering the evidence to prove that the assertion was true. A rose by any other name would smell as sweet.

32. The mere fact that the evidence was hearsay does not, alone, condemn it. However, unlike *Chambers v. Mississippi*, *supra* (§ 22) (involving the accused's fundamental right to confront an adverse witness), this evidence was not presumptively reliable or closely akin to a recognized hearsay exception. Indeed, none of the cases in which the Supreme Court found evidentiary prohibitions objectionable involved efforts by an the accused to circumvent the adversary process by "smuggling" in his assertions, in lieu of testifying.<sup>7</sup> Had the accused testified, he might at

<sup>7</sup> We recognize that, in some circumstances, it is possible under Fed.R.Evid. 703 and Mil.R.Evid. 703. Manual, *supra*, for a certain amount of hearsay evidence to be "smuggled" in as the basis for an expert's opinion. S. Saltzburg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual* 739 (3d ed.1991); see S. Saltzburg, M. Martin & D. Capra, *2 Federal Rules of Evidence Manual* 1134 (6th ed.1994). However, it is clear from the rule drafters' notes and the recorded decisions that such hearsay basis is permitted because it leads to some diagnosis or opinion other than that the hearsay itself was true. For example, a doctor might rely on a range of medical tests and reports, as well as statements



least have argued that the truthfulness of his out-of-court statement was not offered to prove the truth of the matter asserted, but, instead, for the inference that his consistent trial testimony was true.

33. In *Gipson*, we addressed a similar concern. As we stated then:

Assuming a judge decides to admit the results of a given polygraph, how can they be used at trial? First and foremost, while polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character. At best, the expert can opine whether the examinee was being truthful or deceptive in making a particular assertion at the time of the polygraph exam. It is then for the factfinder to decide whether to draw an inference regarding the truthfulness of the examinee's trial testimony. Cf. *Commonwealth v. Vitello*, 376 Mass. 426, 381 N.E.2d 582, 597-98 (1978). Theoretically, it is conceivable that an expert's opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to guilt or innocence. However, we would not condone such opinion testimony absent the examinee's consistent testimony. If it were otherwise, the conclusions of the expert concerning the credibility of the declarant would be the only evidence presented to the factfinder. In this circumstance, we really would be concerned about usurpation of the factfinder's role.

of the victim or witnesses—not to show that the statements were true—but in order to reach a medical diagnosis. Rule 703 was never intended to become the electronic oath helpers' exception to the rule against hearsay. Cf. 2 McCormick on Evidence §§ 244-46 at 90-99 (4th ed.1992).

24 MJ at 252-53 (footnotes omitted).

34. In concluding that the accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis, we recognize that we resolve little of the underlying question of the constitutionality of Mil.R.Evid. 707. Indeed, we do not even resolve whether the per se exclusion of this genre of evidence can be sufficient to implicate a constitutional right of an accused. That is to say, is this collateral-type evidence (an out-of-court, post-offense assertion of innocence by an accused, offered by the accused) of the same constitutional magnitude as those types of evidence that the Supreme Court has ruled constitutionally required? There are simply so many variables in the circumstances of individual cases that we deem it fruitless at this point to speculate generally in the absence of specific facts.<sup>8</sup>

The decision of the United States Army Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Army

<sup>8</sup> Opinions from 41 MJ 213 to 43 MJ 389 have all included paragraph numbers as part of an experiment which the Court has been conducting to determine whether their use is feasible. We are now satisfied that putting paragraph numbers in our opinions presents no administrative burden. The Court was considering whether to require use in briefs of paragraph numbers instead of West internal page numbers for citation of quoted or referenced material found in an opinion. The citation would be to the first page of the opinion and paragraph number (42 MJ 340 ¶ 14), rather than to an internal page number (42 MJ 340, 343 or 42 MJ at 343). The Court has concluded that at this time it is not necessary to implement this change in the citation format. We would be interested in any comments on this proposal, including suggestions of alternative citation formats.

for remand to the Court of Criminal Appeals for further review.

Judge GIERKE concurs.

WISS, Judge (concurring with reservation):

35. I concur in the majority opinion except that, as to footnote 6, I expressly keep open for myself the question whether a non-testifying accused may preserve this issue for appellate review if he makes and loses a motion in limine to admit expert testimony concerning polygraphic evidence and then, through counsel—an officer of the court—forthrightly asserts that he would have testified had his motion been granted. See *United States v. Sutton*, 31 MJ 11 (CMA 1990).

CRAWFORD, Judge (concurring in part and in the result):

36. I agree with the majority's excellent discussion as to whether there is a constitutional right to introduce exculpatory polygraph evidence that would be paramount to any Military Rule of Evidence. However, since neither the Constitution nor the Uniform Code of Military Justice compels admission of exculpatory polygraph evidence, the majority could have stopped at that point. *United States v. Rodriguez*, 37 MJ 448, 453 (CMA 1993) (Crawford, J., concurring in the result).

37. In any event, since the accused did not take the witness stand, he did not preserve the certified issue for appeal. *United States v. Gee*, 39 MJ 311 (CMA 1994); see also *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).

38. However, I find curious that portion of the opinion that says "the proffered evidence was not just hearsay, but super-enriched hearsay." ¶ 29. The majority goes on to say, "[T]he expert's opinion cannot be separated from the underlying out-of-court declaration," ¶ 31, thus implying that there would be a hearsay objection to the expert's opinion. But as this Court stated in *United States v. Houser*, 36 MJ 392, 399, cert. denied, — U.S. —, 114 S.Ct. 182, 126 L.Ed.2d 141 (1993):

Under Mil.R.Evid. 703, like Fed.R.Evid. 703, an expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial.

39. Fed.R.Evid. 703 was enacted to allow the expert to rely upon hearsay evidence, that is, evidence that would be relied upon to form an opinion, such as statements from other doctors, x-rays, business reports, and so forth. S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 73 (5th ed.1990); see also J. Kaplan, J. Waltz, & R. Park, *Cases and Materials on Evidence* 764, 806 (7th ed.1992).

40. Therefore, it would seem to me that the accused's statements to a polygrapher are a valid basis for an otherwise relevant opinion. See *Barefoot v. Estelle*, 463 U.S. 880, 896-903, 103 S.Ct. 3383, 3396-3400, 77 L.Ed.2d 1090 (1983); *United States v. Prevatte*, 40 MJ 396, 397 (CMA 1994); *United States v. Johnson*, 35 MJ 17 (CMA 1992); *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994). However, since I believe this case can be decided on other grounds, the question of whether the majority's view on hearsay is correct can wait for another day.



SULLIVAN, Chief Judge (concurring in the result):

41. I agree with much of the majority opinion but conclude it does not go far enough to directly answer the certified issue, which asks:

WHETHER MILITARY RULE OF EVIDENCE  
707 VIOLATES THE ACCUSED'S FIFTH  
AMENDMENT RIGHT TO A FAIR TRIAL  
OR HIS SIXTH AMENDMENT RIGHT TO  
PRODUCE FAVORABLE WITNESSES.

42. Initially, I would hold that the Fifth and Sixth Amendments of our Constitution do apply to the military. As the venerable Blackstone intimated long ago, I believe that a soldier who serves his country does not forgo his rights as a citizen. Blackstone, *Commentaries on the Laws of England Bookfirst*, Chapter 13 at 395 (1765). Furthermore, I would hold that due process and the right to a fair trial require admission of relevant and reliable evidence as long as it applies to the crime, the witnesses, and the legal defenses to the crime. The Constitution, however, does not require admission of machine-generated evidence that only shows whether the defendant believes that his claim of innocence is truthful. Modern courts have consistently prevented admission of evidence of truth-telling, and I would do so in this case.

43. The evidence sought to be introduced at this trial was the polygraph result of "no deception" when the accused was asked whether he "stole from the Chaplain's fund between August and November of 1991." See 39 MJ 555, 556 (ACMR 1994). In my view, the judge properly ruled this evidence inadmissible.

44. First, when evidence of polygraph tests results is offered at trial to support the credibility of an accused's pretrial statement denying an offense, its admission also raises serious questions under Mil.R. Evid. 608, *Manual for Courts-Martial, United States*, 1984. See generally *United States v. Azure*, 801 F.2d 336, 341 (8th Cir.1986). That Rule states:

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Applying this rule, we have barred testimony from psychiatric and psychological experts that child-abuse victims are telling the truth in their pretrial complaints. *United States v. Marrie*, 43 MJ 35, 41 (1995); *United States v. Suarez*, 35 MJ 374, 376 (CMA 1992); *United States v. Arruza*, 26 MJ 234, 237 (CMA 1988), cert. denied, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989). The same logic should be extended to a mechanical oath swearer or compurgator.

45. I would also note that admissibility of such evidence for this purpose infringes on the jury's role in determining credibility. See *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir.1975). The

Ninth Circuit commented on this problem in *Brown v. Darcy*, 783 F.2d 1389, 1396-97 (1986), as follows:

The introduction of polygraph evidence also infringes on the jury's role in determining credibility. Our adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes. Allowing a polygraph expert to analyze responses to a series of questions and then testify that one side is telling the truth interferes with this function. See *Alexander* 526 F.2d at 168; see also *Dowd*, 585 F.Supp. at 434. Polygraph evidence is different from other scientific evidence such as ballistics, fingerprints, or voice analysis, because it is an opinion regarding the ultimate issue before the jury, not just one issue in dispute. *Alexander*, 526 F.2d at 169. Providing the jury with an all or nothing evaluation of credibility and then telling the jury that this evaluation has an eighty percent to ninety percent chance of being accurate if the polygraph was properly administered interferes with, rather than enhances, the deliberative process.

These concerns are not addressed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Mil.R.Evid. 702. In my view, Mil.R.Evid. 707 addresses them and properly so.

## APPENDIX D

Military Rule of Evidence 707 provides:

### Rule 707. Polygraph Examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## APPENDIX E

### DRAFTERS' ANALYSIS OF THE MILITARY RULES OF EVIDENCE

The Military Rules of Evidence, promulgated in 1980 as Chapter XXVII of the Manual for Courts-Martial, United States, 1969 (Rev. ed.), were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice, which consisted of Commander James Pinnell, JAGC, U.S. Navy, then Major John Bozeman, JAGC, U.S. Army (from April 1978 until July 1978), Major Fredric Lederer, JAGC, U.S. Army (from August 1978), Major James Potuk, U.S. Air Force, Lieutenant Commander Tom Snook, U.S. Coast Guard, and Mr. Robert Mueller and Ms. Carol Wild Scott of the United States Court of Military Appeals. Mr. Andrew Effron represented the Office of the General Counsel of the Department of Defense on the Committee. The draft rules were reviewed and, as modified, approved by the Joint Service Committee on Military Justice. Aspects of the Rules were reviewed by the Code Committee as well. See Article 67(g). The Rules were approved by the General Counsel of the Department of Defense and forwarded to the White House via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation.

The original Analysis was prepared primarily by Major Fredric Lederer, U.S. Army, of the Evidence

Working Group of the Joint Service Committee on Military Justice and was approved by the Joint Service Committee on Military Justice and reviewed in the Office of the General Counsel of the Department of Defense. The Analysis presents the intent of the drafting committee; seeks to indicate the source of the various changes to the Manual, and generally notes when substantial changes to military law result from the amendments. This Analysis is not, however, part of the Executive Order modifying the present Manual nor does it constitute the official views of the Department of Defense, the Department of Transportation, the Military Departments, or of the United States Court of Military Appeals.

The Analysis does not identify technical changes made to adapt the Federal Rules of Evidence to military use. Accordingly, the Analysis does not identify changes made to make the Rules gender neutral or to adapt the Federal Rules to military terminology by substituting, for example, "court members" for "jury" and "military judge" for "court". References within the Analysis to "the 1969 Manual" and "MCM, 1969 (Rev.)" refer to the Manual for Courts-Martial, 1969 (Rev. ed.) (Executive Order 11,476, as amended by Executive Order 11,835 and Executive Order 12,018) as it existed prior to the effective date of the 1980 amendments. References to "the prior law" and "the prior rule" refer to the state of the law as it existed prior to the effective date of the 1980 amendments. References to the "Federal Rules of Evidence Advisory Committee" refer to the Advisory Committee on the Rules of Evidence appointed by the Supreme Court, which prepared the original draft of the Federal Rules of Evidence.

During the Manual revision project that culminated in promulgation of the Manual for Courts-Martial, 1984 (Executive Order 12473), several changes were made in the Military Rules of Evidence, and the analysis of those changes was placed in Appendix 21. Thus, it was intended that this Appendix would remain static. In 1985, however, it was decided that changes in the analysis of the Military Rule of Evidence would be incorporated into this Appendix as those changes are made so that the reader need consult only one document to determine the drafters' intent regarding the current rules. Changes are made to the Analysis only when a rule is amended. Changes to the Analysis are clearly marked, but the original Analysis is not changed. Consequently, the Analysis of some rules contains analysis of language subsequently deleted or amended.

In addition, because this Analysis expresses the intent of the drafters, certain legal doctrines stated in this Analysis may have been overturned by subsequent case law. This Analysis does not substitute for research about current legal rules.

Several changes were made for uniformity of style with the remainder of the Manual. Only the first word in the title of a rule is capitalized. The word "rule" when used in text to refer to another rule, was changed to "Mil.R.Evid." to avoid confusion with the Rules for Courts-Martial. "Code" is used in place of Uniform Code of Military Justice. "Commander" is substituted for "commanding officer" and "officer in charge." See R.C.M. 103(b). Citations to the United States Code were changed to conform to the style used elsewhere. "Government" is capitalized when used as a noun to refer to the United States



Government. In addition, several cross-references to paragraphs in MCM, 1969 (Rev.) were changed to indicate appropriate provisions in this Manual.

With these exceptions, however, the Military Rules of Evidence were not redrafted. Consequently, there are minor variations in style or terminology between the Military Rules of Evidence and other parts of the Manual. Where the same subject is treated in similar but not identical terms in the Military Rules of Evidence and elsewhere, a different meaning or purpose should not be inferred in the absence of a clear indication in the text or the analysis that this was intended.

\* \* \* \*

#### Rule 707. Polygraph Examinations.

Rule 707 is new and is similar to Cal. Evid. Code 351.1 (West 1988 Supp.). The Rule prohibits the use of polygraph evidence in courts-martial and is based on several policy grounds. There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted". *Id.* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs. This could result in the court-martial degenerating into a trial of

the polygraph machine. *State v. Grier*, 300 S.E.2d 351 (N.C. 1983). Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system. See *People v. Kegler*, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987). Thus, this amendment adopts a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties. This amendment is not intended to accept or reject *United States v. Gipson*, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil. R. Evid. 702 or the continued vitality of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Finally, subsection (b) of the rule ensures that any statements which are otherwise admissible are not rendered inadmissible solely because the statements were made during a polygraph examination.

96-1133

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Supreme Court, U.S.

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No.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

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UNITED STATES OF AMERICA, PETITIONER

v.

AIRMAN EDWARD G. SCHEFFER, RESPONDENT

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**Brief in Opposition to Petition for a Writ of Certiorari to  
the United States Court of Appeals for the Armed Forces**

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**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgement of military defendants' right to present a defense.

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Pursuant to this Honorable Court's order of 10 March 1997, respondent hereby files this Brief in Opposition to petitioner's petition for a writ of certiorari. The respondent, Airman Edward G. Scheffer, respectfully prays that the writ of certiorari filed by the petitioner to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 18 September 1996, be denied.

#### **OPINIONS BELOW**

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 44 MJ 442 (1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, reported at 41 MJ 683 (AF Ct. Crim App 1995), is located at Appendix B.

#### **JURISDICTION**

The judgment of the United States Court of Appeals for the Armed Forces was entered on 18 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a).

#### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."



### STATEMENT OF THE CASE

Respondent, Airman Edward G. Scheffer, was tried on 14-17 October 1992, by general court-martial at March Air Force Base, California, for making and uttering checks with the intent to defraud under Article 123a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 923a; wrongfully using methamphetamine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and failing to go to his appointed place of duty, in violation of Article 86, UCMJ, 10 U.S.C. § 886. He was sentenced to a bad conduct discharge, 30 months confinement, forfeiture of all pay and allowances, and reduction to the rank of Airman Basic. The convening authority approved the sentence as adjudged. On appeal to the Air Force Court of Criminal Appeals, the Court affirmed the findings and the sentence, ordering one day credit against his sentence for illegal pretrial confinement. App., *infra*, 48a. Respondent appealed to the Court of Appeals for the Armed Forces, which reversed and remanded. App., *infra*, 15a.

1. The only evidence admitted against respondent at his court-martial to prove his wrongful and knowing use of methamphetamine was the result of a random urinalysis test. (Pros. Exs. 1, 4). Respondent testified under oath in his own defense and denied knowingly ingesting methamphetamine. (R. 291). On cross-examination, his credibility was attacked.

On 10 April 1992, before respondent was requested to provide a urine sample, Air Force Office of Special Investigation (OSI) agents asked respondent to submit to a polygraph examination. Respondent agreed and took the exam the same day. The examination was administered by a government certified OSI polygrapher. The polygrapher asked respondent three questions: (1) Since you've been in the AF, have you ever used any illegal drugs?; (2) Have you lied about any of the drug information you've given OSI?; and (3) Besides your parents, have you told anyone you're assisting

OSI? Respondent answered "No" to each question. In the opinion of the polygrapher, based upon the polygraph examination he administered, respondent indicated no deception in answering the questions. (App. Ex. VII; R. 45).

2. At respondent's court-martial, defense counsel filed a motion requesting that "[t]he defense should be allowed to lay a foundation for the admission of the polygraph test in issue. The military judge should evaluate the adequacy of the foundation from the standpoint of relevance and helpfulness, and 'in these areas, judges should bend even further than normal in the direction of giving the accused the benefit of the doubt.'" (Citation omitted). (App. Ex. VII). The military judge, without hearing any testimony from the OSI polygrapher or any other evidence on the motion, denied respondent the opportunity to lay a foundation under Mil.R.Evid. 702.<sup>1</sup> The judge, without hearing any evidence involving the non-exhaustive principles set forth by this Honorable Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), ruled that "the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant." (R. 46). He further ruled that, under Mil.R.Evid. 403<sup>2</sup>, "the fact finder might give it too much weight, and that there is an inordinate amount of time and expense, especially in cases where there may be conflicting tests, which doesn't appear to be the case here. The main confusion of the issue;

<sup>1</sup>Which is the same as Federal Rule of Evidence 702.

<sup>2</sup>Which holds: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The rule is the same as Federal Rule of Evidence 403.

that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs." (R. 46).

3. On appeal, respondent contended that the military judge had made two separate errors in ruling that the polygraph evidence was inadmissible in his case. First, he abused his discretion when he ruled that, due to the potential for confusion of conflicting tests (of which there were none in respondent's case) there would be an undue risk of confusion to the court-members.<sup>3</sup> Second, he erred when he applied Mil.R.Evid. 707, a rule of evidence which respondent submits is unconstitutional because it denied him the opportunity to lay a foundation for the admission of scientific evidence and to present relevant and favorable evidence in his defense, in violation of the Fifth and Sixth Amendments to the United States Constitution.

The Court of Appeals for the Armed Forces agreed that Mil.R.Evid. 707 was unconstitutional, however, only to the extent it denies an accused the opportunity to admit exculpatory scientific evidence under Mil.R.Evid. 702 and this Court's decision in *Daubert, surpa*: "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility," quoting from *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995). App., *infra*, 10a. The Court did not otherwise hold Mil.R.Evid. 707 unconstitutional, but left that question for another day.

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<sup>3</sup>Respondent refers in this Brief to "court-members" and "accused," when applicable, since those are the terms used in the military for the functional equivalent of a civilian "jury" and "defendant," respectively.

## REASON FOR DENYING THE WRIT

The Court of the Appeals for the Armed Forces' narrowly tailored holding which "merely remov[ed] the obstacle of the *per se* rule [of Military Rule of Evidence 707] against admissibility" of exculpatory polygraph evidence offered by a military accused was proper. Military Rule of Evidence 707 infringes upon an accused's Sixth Amendment right to present a defense. The rule is a *per se* rule of exclusion which fails to take into account the particular facts and circumstances of an individual case. The rule does not allow an accused to attempt to lay a foundation for admission of scientific evidence that may otherwise be admissible. Further, most Federal Courts admit polygraph evidence to one degree or another, and do not have a *per se* rule of inadmissibility.

The reasons set forth in Mil.R.Evid. 707 for blanket exclusion of polygraph evidence are arbitrary and unreasonable. It cannot be determined in a vacuum that polygraph evidence, in all cases, under all circumstances, is confusing, a waste of time, and unreliable. Scientific evidence does not usurp the court-members' role, rather it may assist them in performing that role.

Finally, consideration of the uniqueness of military society does not warrant a *per se* exclusion of all polygraph evidence. Military courts routinely consider technical and scientific evidence, often far more complex than polygraph evidence, and consider expert testimony on a myriad of other issues. The carefully crafted holding in this case was rendered by the Court of Appeals for the Armed Forces, which is uniquely qualified to balance the specialized needs of military society with the fundamental right of a military accused to present his or her defense.

1. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be



...deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

The combined effect of the Amendments is a "require[ment] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). An accused must be afforded a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver*, 333 U.S. 257, 273 (1948).

This Court has often declared that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Moreover, in protection of this fundamental right, this Court has consistently reversed convictions where an accused was denied the opportunity to present relevant, probative evidence in his defense based on the mechanistic applications of *per se* exclusionary rules. The Supreme Court declared long ago that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use." *Washington v. Texas*, 388 U.S. at 23 (Sixth Amendment violated by arbitrary denial of accomplice testimony in favor of the defense). An accused's right to present testimony that is relevant and material may not be denied arbitrarily. *Id.*

The issue in this case is whether the government can rely on a *per se* rule of evidence that denies an accused the opportunity to show that he has exculpatory scientific evidence and to present that favorable evidence if the proper evidentiary foundation is established. This Court has said "No" in similar cases.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Court reversed a state court opinion that relied on a *per se* exclusionary rule without regard to the rights of the defendant. The defendant was charged with manslaughter based on the shooting death of her husband. Because the defendant could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. She was hypnotized twice but did not relate any new information during either of the sessions. After the hypnosis, however, she remembered details of the shooting that were corroborated by other evidence in the case.

At the time of the defendant's trial, Arkansas had a *per se* rule of evidence that did not allow the trial court to consider whether posthypnosis testimony could be admissible in a particular case. Acting on the government's pretrial motion, the trial court issued an order limiting petitioner's testimony to matters remembered and stated to the examiner prior to hypnosis.

In reviewing the scientific validity of hypnosis, the Supreme Court noted that "there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled." *Rock*, 483 U.S. at 59 (citation and footnote omitted). Moreover, the Court stated that "[w]e are not now prepared to endorse without qualifications the use of hypnosis as an

investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." *Rock*, 483 U.S. at 61. Nonetheless, the Court declared:

Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring *unreliable evidence does not extend to per se exclusions* that may be reliable in an individual case. *Wholesale inadmissibility* of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections.

*Rock*, 483 U.S. at 61. (Emphasis added). See also *Davis v. Alaska*, 415 U.S. 308 (1974) (petitioner's right of confrontation is paramount to a State's rule prohibiting cross-examination of government witness concerning the witness' probationary status as a juvenile delinquent).

In *Chambers v. Mississippi*, *supra*, this Court held that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. In *Chambers*, the defendant was convicted of murdering a policeman. After his arrest, but prior to trial, another man, McDonald, on three separate occasions, confessed to the murder in a sworn written statement and in unsworn oral statements to others. McDonald was called as a defense witness, but repudiated his prior statements. The defendant was unable to cross-examine him because of a state rule preventing a party from impeaching its own witness. McDonald's oral confessions to others were excluded from evidence as inadmissible hearsay. This Court held that although the defendant was able to "chip . . . away at the fringes" of McDonald's story by the

admission of other evidence, his defense was "far less persuasive than it might have been had he been given an opportunity" to present a complete defense. *Id.* at 294. Without deciding the validity of the state "voucher" rule and while plainly recognizing the validity and widespread acceptance of the hearsay rule, the Court held that the combination of the two evidentiary rules as applied in *Chambers* denied the defendant his right to a fundamentally fair trial. *Id.* at 303. See also *Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony about the circumstances of a confession deprived the defendant of his right to present a defense).

2. Although *Rock* involved an accused's own testimony, *Washington* and *Chambers* did not. The lesson of cases such as *Chambers*, *Washington*, and *Rock* is clear: when an accused's ability to present a defense is implicated, there must be a compelling governmental interest to overcome an accused's constitutional rights. The Supreme Court provided a framework for addressing this issue in *Rock*, *supra*:

. . . restrictions of a defendant's rights to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify.

*Rock* 483 U.S. at 55-56.

Applying *Chambers*, *Rock*, and *Washington* to Mil.R.Evid. 707, one must look to the rationale provided by the drafters of the rule and ask, do the interests served justify the limitations imposed on an accused? The Drafter's Analysis to Mil.R.Evid. 707 (the rule was adopted in 1991) sets forth four reasons for the *per se* exclusion of polygraph evidence:



(1) fear that court members would be misled, (2) concern that a confusion of issues would arise, (3) the possibility that the trial would incur a substantial waste of time, and (4) that the polygraph is inherently unreliable.

*United States v. Williams*, 39 MJ 555, 558 (ACMR 1993), vacated, 43 MJ 348 (1995).

The first three reasons given in the drafters' analysis deal with the belief that court-members will be confused or misled by polygraph evidence. However, numerous scientific studies have shown that civilian juries are not unduly influenced or confused by polygraph evidence. See *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989). Given the qualifications of military court-members, it is unlikely they would be either.<sup>4</sup> Further, in the drafter's analysis to Mil.R.Evid. 704, the drafters note that they are confident "[t]he statutory qualifications for military court-members reduce the risk that military court members will be *unduly influenced* by the presentation of ultimate opinion testimony from psychiatric experts." (Emphasis added). Manual For Courts-Martial (MCM), United States, 1984, App. 22, pg. A22-46. The reasoning used to justify Rule 707 is

<sup>4</sup>Under Article 25(d)(2), UCMJ, states in pertinent part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Generally, court-martial panels are comprised of military officers, although enlisted personnel may serve at the accused's request. All officers detailed to courts-martial have at least a bachelors degree, and many have graduate degrees. Almost without exception, enlisted personnel detailed to a panel have a high school degree and have served in their branch of service for many years.

inconsistent with these studies and the justification for not adopting Rule 704(b).

In *Williams*, the Army Court of Military Review looked at the reasons for exclusion of polygraph evidence articulated by the drafters and found them wanting. They correctly noted that the first three concerns were routinely resolved by trial judges under Mil.R.Evid. 403. Moreover, the Army court declared that the "fourth reason is, in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations. . . ." *Williams*, 39 M.J. at 558. Further, as the Court of Military Appeals has noted, "[t]he greater weight of authority indicates it can be a helpful scientific tool." *United States v. Gipson*, 24 MJ 246 (CMA 1987).

Likewise the belief that polygraph evidence is inherently unreliable is misplaced and arbitrary. Mil.R.Evid. 707 completely ignores the facts and circumstances of a particular case and denies an accused the opportunity to lay a foundation for an entire category of scientific evidence. It presumes that for all time and in all fact situations, the scientific understanding and support of polygraph evidence will remain the same. It does not allow lawyers to build support for the scientific validity of a category of scientific evidence. Fifteen years ago, DNA evidence in a criminal trial was new and untested. It was the subject of controversy in both the legal and scientific fields. See *United States v. Two Bulls*, 918 F.2d 56, 58 (8th Cir. 1990). At that time, many of the same arguments that were made against the use of DNA evidence are being used today to arbitrarily prevent a defendant from laying a foundation for scientific evidence under *Daubert* and Mil.R.Evid. 702. However, today DNA evidence is generally accepted throughout the United States.

Given that no evidence was presented in respondent's case about the polygraph he took, the Department of Defense's heavy reliance on polygraphs, the fact that the polygrapher in respondent's case was a certified government polygrapher, and given the significant advances in the field of polygraphs, (See *Piccinonna, supra*), it is completely arbitrary to conclude that respondent's polygraph, or any polygraph in a particular case, is inherently unreliable. The perceived unreliability or controversy of particular scientific evidence is not the controlling issue in determining its admissibility. *Rock, supra*; See also *Daubert, supra*. The reasons advanced for the creation of Mil.R.Evid. 707 are arbitrary and unreasonable.

3. Petitioner argues that a defendant does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence, citing *Taylor v. Illinois, supra*.<sup>5</sup> Petition, at 14. The polygraph evidence in respondent's case, however, was not privileged, there were no facts to show that his polygraph was incompetent, and Mil.R.Evid. 707 is not a "standard" rule of evidence. Moreover, the holding of this Court in the *Rock* case is applicable to scientific polygraph evidence. Like hypnotically induced testimony, it argued that the scientific understanding of polygraph evidence is "controversial" and the current "legal view of its appropriate role is unsettled." Nevertheless, this does not justify exclusion of all polygraph evidence and denial of an accused's right to lay a foundation for the admissibility of polygraph evidence. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. *Rock, supra*. Mil.R.Evid. 707 unreasonably presumes that all polygraph evidence, no matter the

<sup>5</sup>Most of the Federal Circuits do not have *per se* rules holding polygraph evidence inadmissible in all cases. *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989).

circumstances under which it is taken, no matter the facts of a particular case, no matter the scientific advances in the art of polygraph evidence, and no matter the purpose for the polygraph evidence, will always and forever be unreliable, confusing, and a substantial waste of time. But, "critics of polygraph evidence seem to forget that no evidence can be said to be one hundred percent accurate." John J. Canham, Jr., *Military Rule of Evidence 707: A Bright Line Rule That Needs to be Dimmed*, 140 Mil L. Rev. 65 (1993). It is the utter arbitrariness of the rule that makes it unconstitutional.<sup>6</sup>

4. Petitioner argues that Mil.R.Evid. 707 "need only recognize, as the President did in promulgating Rule 707, that the technique's lack of broad acceptance will result in time-consuming collateral litigation designed to ensure the factfinder is not confused or unduly swayed. . . ." Petition, at 16. On the contrary, polygraph evidence does not lack "broad acceptance."

As the Army Court of Criminal Appeals noted in *Williams, supra*, the Department of Defense relies heavily on the use of polygraphs. Further, every Federal Circuit save two allows the admission of polygraph evidence. *Piccinonna, supra* (noting that, at that time, only the Fourth, Fifth, and DC Circuits had a *per se* rule against admissibility). In 1991, the

<sup>6</sup>It cannot be overemphasized that Mil.R.Evid 707 bars polygraph evidence in all situations, even if an accused attempts to admit a polygraph test as mitigation evidence during the sentencing phase of her death penalty case. In a footnote in *Lankford v. Idaho*, 500 U.S. 110 (1991), this Court noted, in regard to the admission of polygraph evidence as mitigation during sentencing in a death penalty case, that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable." Mil.R.Evid. 707 would exclude polygraph evidence by a military accused in such a case.



Fourth Circuit noted the serious constitutional concerns involving a *per se* rule of inadmissibility of polygraph evidence. See *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n.4 (4th Cir. 1991). Further the DC Circuit rule of inadmissibility is based upon decisions from the 1970's, prior to the creation of Fed.R.Evid. 702 and this Court's ruling in *Daubert*, *supra*. See *United States v. Skeens*, 494 F.2d 1050 (DC Cir. 1973). Since *Piccinonna*, the Fifth Circuit has abandoned its *per se* rule of inadmissibility. *United States v. Pettigrew, et al.*, 77 F.3d 1500 (5th Cir. 1996), citing *Posado*, *supra*. Finally, the Ninth Circuit does not have a *per se* rule of exclusion. *United States v. Miller*, 874 F.2d 1255, 1262 (9th Cir. 1989), *cert denied*, 510 U.S. 894; *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988); *United States v. Crumby*, 895 F.Supp. 1354 (D. Ariz. 1995) ("Stipulated polygraph evidence has been in use in the Ninth Circuit for a number of years and its use is prevalent in most circuits"). The *Crumby* court did away with the bar to unstipulated polygraph evidence.

Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 838, does allow the President "so far as he considers practicable, [to] apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." A *per se* rule of inadmissibility regarding polygraph evidence, however, is not one of those "generally recognized" rules of evidence. At least with the federal government and federal courts, polygraph evidence does not lack broad acceptance. The military justice system stands essentially alone in the Federal system in not allowing an accused the opportunity to lay a foundation for polygraph evidence.

5. Petitioner argues that polygraph evidence usurps a

jury's role in determining credibility. Petition, at 15. It does not. The polygrapher in respondent's case was simply going to testify that respondent's answers to relevant questions indicated "no deception," not that, in the expert's opinion, the respondent was telling the truth or didn't use drugs.

One rationale for the policy against not allowing witnesses to testify that they believe a victim or an accused is telling the truth is a concern that "the members of the court may be misled into believing that the character witness has himself made inquiry into the merits of the case, and has reached his own admissible conclusion." *United States v. Adkins*, 5 USCMA 492, 18 CMR 116 (1955). Clearly, this would not be a concern with the polygrapher's testimony. The court-members would know what tests the polygrapher has done and why he is testifying. Further, proper limiting instructions could be given by the judge. If anything, the results of a polygraph, measuring bodily responses and reactions of a witness to relevant questions, provide court-members with relevant information about a witness to help them determine credibility.<sup>7</sup> It does not determine the truthfulness of the allegations.

6. Finally, petitioner argues that the Court of Appeals' opinion "does not reflect consideration" that the military is a specialized society separate from civilian society, and that the costs of allowing a defendant the opportunity to lay the foundation for polygraph evidence "are particularly unwarranted and onerous in the military context." Petition, at

<sup>7</sup>Bias, prejudice, character for truthfulness, prior convictions, the fact that a witness is testifying under a grant of immunity, prior inconsistent statements, prior consistent statements, being paid to testify (expert witnesses), are just some of the further types of evidence placed before a jury to help them in determining the credibility of the witnesses' testimony. The rules allow all of this evidence, in a proper case, to go before the jury.

16. This argument fails to recognize the unique role of the Court of Appeals for the Armed Forces in the military justice system, the reasons articulated by the President for the promulgation of Mil.R.Evid. 707, and the nature of the case launched by the prosecution against respondent at his court-martial.

The Court of Appeals for the Armed Forces was specifically created to safeguard the rights of servicemembers. In creating the UCMJ and the present appellate structure in 1950, it was Congress' belief that oversight of the military justice system would be strengthened. As Congressman Philbin from Massachusetts noted about the Court of Military Appeals during the Congressional Floor Debate on the UCMJ:

[I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

Cong. Floor Debate on UCMJ, U.S. House of Representatives, Cong. Record, Vol 95, Pt 5, p.5718 (1949).

If any court in the United States is uniquely qualified to consider the specialized and unique structure of the Armed Forces, it is the Court of Appeals for the Armed Forces, which has been doing exactly that for 46 years. In the past, this

Honorable Court has cited to the Court of Appeals for the Armed Forces when discussing the deference civilian courts must give to the "specialized society" that is the military. *Parker v. Levy*, 417 U.S. 733, 753 (1974). In this case, this Honorable Court should give great deference to the Court of Appeals consideration of the factors petitioner discusses, when it determined that, under the military criminal justice system, the reasons set forth for the creation of Mil.R.Evid. 707 do not warrant a radical departure from the practice of the vast majority of Federal Courts.

Petitioner's concern about military society also does not take into account that the Air Force, in deciding to prosecute servicemembers when their urinalysis samples tests positive for illegal drugs, has created a very complex and expensive litigation network. The military is the only jurisdiction, known to respondent, that prosecutes people based merely on the results of a urinalysis test. In all cases involving a urinalysis, the prosecution is required to call an expert witness to explain the scientific test result to the factfinder and lay the proper foundation for its admission. *United States v. Hunt*, 33 MJ 345 (CMA 1991). The accused is also normally provided a defense expert witness.

In respondent's case, the prosecution proved that respondent had knowingly used methamphetamine by offering into evidence the results of a machine, which measured metabolites of a drug respondent had in his system. To interpret this scientific evidence and establish a proper foundation and chain of custody, the prosecution was not required to call any of the laboratory personnel who conducted the test of respondent's urine, but offered an "expert witness" to explain to the factfinder what the results of the machine that tested respondent's urine revealed. From this evidence, and no other, the factfinder was allowed to infer that respondent knowingly used an illegal drug. In his



defense, respondent could not cross examine the machine or laboratory personnel that tested his urine sample. He did, however, wish to lay a foundation to offer into evidence the results of a machine that measured, much like the machine used to test his urine, reactions of his body that the factfinders could not observe. These results were relevant in determining respondent's credibility. To interpret the results of this scientific evidence, respondent too wanted to call an expert witness to explain his conclusions as to what a machine measured. In his case, though, the prosecution cried foul and on appeal the United States says he cannot do so. Petitioner's argument is an argument the Constitution will not allow.

The concern noted by this Honorable Court over 20 years ago in *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976), that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants,<sup>8</sup> including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline" is not an overriding concern today. The Air Force now routinely goes to great lengths to prosecute complex urinalysis cases. Similarly, the Air Force has welcomed with open arms the use of DNA evidence in court-martials, with all of its "procedural complexities." *United States v. Thomas*, 43 MJ 626 (AF Ct. Crim App. 1995). Military courts cannot be expected to allow

<sup>8</sup>With respect to Air Force counsel, at least, this concern is unwarranted. Their military duty is to spend their time in matters involving imposition of military discipline. Officers are assigned as circuit defense counsel and circuit trial counsels whose primary mission is to try court-martials in various "circuits" throughout the world. Any other tangential duties they may have are generally related to this primary duty.

"procedural complexities" at a court-martial to perfect the government's case, but not allow them in order to permit an accused to present a viable defense.

Finally, none of the reasons set forth by the drafters in the Analysis to Mil.R.Evid. 707 are addressed to any concern about the uniqueness of military society. MCM, United States, 1984, App. 22, pg. A22-46. This lack of concern is evident when the Analysis to Mil.R.Evid. 702 is considered.

Mil.R.Evid 702 was adopted before Mil.R.Evid. 707. In adopting Mil.R.Evid. 702, the President did away with what was then a *per se* policy against the admission of polygraph evidence: "Para. 142e of the 1969 Manual, 'Polygraph tests and drug-induced or hypnosis-induced interviews,' has (sic) been deleted as a result of the adoption of Rule 702." Paragraph 142e of the 1969 Manual had stated that "The conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug-induced or hypnosis-induced interview are inadmissible in evidence." The Analysis further noted (of Mil.R.Evid. 702),

Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact."

MCM, United States, App. 22, pg. A22-45. In respondent's case, the Court of Appeals did exactly what the President believed, in adopting Mil.R.Evid. 702, would be done when considering the admissibility of polygraph evidence.

### Conclusion

The fundamental problem with Mil.R.Evid. 707 is its denying an accused the opportunity to lay a foundation for admissibility of scientific evidence that may be legally and logically relevant. The rule freezes the law and progress of a category of scientific evidence, *circa* 1991. As the Court of Military Appeals (now the Court of Appeals for the Armed Forces), noted in *Gipson, supra.*:

In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion . . . Rather, until the balance of opinion shifts decisively in one direction or the other, the latest developments in support of or in opposition to particular evidence should be marshaled at the trial level.

*Gipson*, 24 MJ at 253.

Mil.R.Evid. 102 states that the rules of evidence shall be construed to promote the growth and development of the law of evidence. Mil.R.Evid. 707 stunts that growth. "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J. concurring).

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1997



**APPENDIX A**

UNITED STATES, Appellee

v.

Edward G. SCHEFFER, Airman  
U.S. Air Force, Appellant

No. 95-0521

Crim. App. No. 30304

United States Court of Appeals for the Armed Forces

Argued May 8, 1996

Decided Sep. 18, 1996

*Counsel*

For Appellant: *Captain Michael L. McIntyre* (argued);  
*Colonel Jay L. Cohen* and *Captain Del Grissom* (on  
brief); *Lieutenant Colonel Joseph L. Heimann*.

For Appellee: *Major Jane M.E. Peterson* (argued); *Colonel  
Teffery T. Infelise* (on brief).

Military Judge: H. Martin Jayne

*Opinion of the Court*

GIERKE, Judge:

A general court-martial composed of officer members at March Air Force Base, California, convicted appellant, contrary to his pleas, of uttering bad checks, wrongfully using methamphetamine, failing to go to his appointed place of duty, and absenting himself from his unit (13 days), in violation of Articles 123a, 112a, and 86, Uniform Code of

Military Justice, 10 USC §§ 923a, 912a, and 886, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence but awarded one day of credit against his sentence to forfeitures (confinement had expired) for lack of timely pretrial confinement review, relying on *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *United States v. Rexroat*, 38 MJ 292 (CMA 1993). See 41 MJ 683, 693 (1995).

We granted review of the following issue:

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO PRESENT EVIDENCE OF A FAVORABLE POLYGRAPH RESULT CONCERNING HIS DENIAL OF USE OF DRUGS WHILE IN THE AIR FORCE.

In March of 1992, appellant began working as an informant for the Air Force Office of Special Investigations (OSI). During late March and early April, appellant told OSI that two civilians, Davis and Fink, were dealing in significant quantities of drugs. On April 7, 1992, at the request of OSI, appellant voluntarily provided a urine sample. Periodic urinalyses are normal procedure for controlled informants.

On April 10, OSI asked appellant to submit to a polygraph examination. The OSI polygraph examiner asked appellant three questions: (1) Had he ever used drugs while in the Air Force; (2) Had he ever lied in any of the drug information he gave to OSI; and (3) Had he told anyone other than his parents that he was assisting OSI? Appellant answered "No" to each question. The polygraph examiner concluded that "no deception" was indicated.

Appellant's urinalysis tested positive for

methamphetamine. The report was dated May 20, although local OSI agents may have learned of the results as early as May 14.

At trial appellant asked the military judge for an opportunity to lay a foundation for the favorable polygraph evidence. The military judge denied the request without receiving any evidence, ruling that "the President may, through the Rules of Evidence, determine that credibility is not an area in which a factfinder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant." He further ruled that under Mil.R.Evid. 403, Manual for Courts-Martial, United States (1995 ed.),

[t]he factfinder might give it too much weight, and that there is an inordinate amount of time and expense, especially in the cases where there may be conflicting tests, which doesn't appear to be the case here. The main confusion of the issue; that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs.

During the trial on the merits, appellant testified that he visited Davis on April 6, left Davis' house around midnight, and began driving toward March Air Force Base. The next thing he remembered was waking up the next morning in his car in a remote area, not knowing how he got there. He denied "knowingly" ingesting drugs at any time between March 5, when he began working for OSI, and April 7, the date he provided the urine sample that tested positive for methamphetamine.

Trial counsel cross-examined appellant about inconsistencies between his trial testimony and earlier statements to the OSI, and his lack of a "sudden rush of



energy” and other symptoms of ingesting methamphetamine. Trial counsel’s closing argument urged the court members to look at appellant’s credibility. Trial counsel argued, “He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don’t believe him. He knowingly used methamphetamine, and he is guilty of Charge II.”

Appellant asserts that Mil.R.Evid. 707 violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by appellant. He argues that he was constitutionally entitled to be given an opportunity to rebut the attack on his credibility as a witness by laying a foundation for favorable polygraph evidence. The Government asserts that the Rule does not impermissibly infringe on the Sixth Amendment. It argues that Mil.R.Evid. 707 merely codifies all the evidentiary prohibitions against polygraph evidence and that, even without Mil.R.Evid. 707, polygraph evidence would never be admissible. We agree with appellant.

In *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), polygraph evidence was held to be inadmissible because it was unreliable. In *United States v. Gipson* 24 MJ 246, 253 (1987), our Court held that an accused is “entitled to attempt to lay” the foundation for admission of favorable polygraph evidence. In arriving at that holding, our Court acknowledged that Mil.R.Evid. 702 “may be broader and may supersede *Frye v. United States*,” *supra*. 24 MJ at 251. The impact of our *Gipson* decision was short-lived, however, because on June 27, 1991, the President promulgated Mil.R.Evid. 707 in Executive Order No.12767, § 2, 56 Fed. Reg. 30296.

Mil.R.Evid. 707 provides: “Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination,

shall not be admitted into evidence.” Unlike most military rules of evidence, Mil.R.Evid. 707 has no counterpart in the Federal Rules of Evidence. It is similar to Cal.Evid. Code 351.1 (West 1988 Supp.). See *People v. Kegler*, 197 Cal. App. 3d 72, 84, 242 Cal. App. 897, 905 (1987). Mil.R.Evid. 707 “is not intended to accept or reject *United States v. Gipson*, 24 MJ 246 (CMA 1987), concerning the standard for admissibility of other scientific evidence under Mil.R.Evid. 702 or the continued vitality of *Frye v. United States*, 293 F.1013 (D.C. Cir.1923).” Drafters’ Analysis of Mil.R.Evid. 707, Manual, *supra* (1995 ca.) at A22–8.

Presidential authority to promulgate rules of evidence is founded on Article 36(a), UCMJ, 10 USC 836(a). That Article provides that such rules “shall, so far as [The President] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”

Appellant’s case presents two questions. The first is a statutory question: did the President comply with Article 36 when he promulgated Mil.R.Evid. 707. The second is a constitutional question: does Mil.R.Evid. 707 violate the Sixth Amendment. We review these questions of law *de novo*. *United States v. Ayala*, 43 MJ 296, 298 (1995).

The statutory question was neither briefed nor argued. It may well be that the *per se* prohibition in Mil.R.Evid. 707 is “at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to “opinion” testimony.’” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S.Ct. 2786, 2794 (1993). We note that the majority of the federal circuits do not have a *per se* prohibition against polygraph evidence. Instead, they rely on the trial judge to apply a *Daubert* analysis and apply Fed. R. Evid. 401–03. *United States v.*

*Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (no *per se* rule against admissibility of polygraph evidence); *see United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (reversing *per se* exclusion of polygraph evidence); *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir., 1989) (holding that polygraph evidence not inadmissible *per se*); *Anderson v. United States*, 788 F.2d 517, 519 n. 1 (8th Cir. 1986) (polygraph evidence admissible by stipulation); *see also United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n. 4 (4th Cir. 1991) (holding that polygraph evidence not admissible in 4th Circuit but recognizing that “[c]ircuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority”). *But see United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph results “inherently unreliable”); *United States v. A & S Council Oil Co.*, *supra* (polygraph evidence not admissible); *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987) (polygraph evidence “not admissible to show” that witness “is truthful”); *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (adhering to Frye and holding polygraph evidence inadmissible); *Dowd v. Calabrese*, 585 F.Supp. 430 (D. D.C. 1984) (polygraph results not sufficiently reliable to be admissible).

The Federal rules are virtually identical to Mil.R.Evid. 401–03. Whether the President determined that prevailing federal practice is not “practicable” for courts-martial cannot be determined from the record before us. Assuming without deciding that the President acted in accordance with Article 36 and determined that the prevailing federal rule is not “practicable” for courts-martial, we turn to the constitutional question.

Our Court entertained a direct attack on the constitutionality of Mil.R.Evid. 707 in *United States v. Williams*, 43 MJ 348 (1995). We held, however, “that the

accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis.” 43 MJ at 355. *See also United States v. Abevta*, 25 MJ 97, 98 (CMA 1987) (polygraph evidence not relevant unless accused testifies). In *Williams* we observed: “Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused’s constitutional trial rights.” 43 MJ at 353.

Unlike *Williams*, this appellant testified, placed his credibility in issue, and was accused by the prosecution of being a liar. Thus the constitutional issue is squarely presented. We hold that Mil.R.Evid. 707, as applied to this case, is unconstitutional. A *per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil.R.Evid. 702 and *Daubert*, violates his Sixth Amendment right to present a defense. We limit our holding to exculpatory evidence arising from a polygraph examination of an accused, offered to rebut an attack on his credibility. We leave for another day other constitutional questions such as those involving government-offered polygraph evidence or evidence of a polygraph examination of a witness other than an accused.

The Sixth Amendment grants an accused “the right to call ‘witnesses in his favor.’” *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). An accused’s right to present testimony that is relevant and material may not be denied arbitrarily. *Washington v. Texas*, 388 U.S. 14, 23 (1967); *see United States v. Woolheater*, 40 MJ 170, 173 (CMA 1994).

The right to present evidence, however, is not unlimited, but “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Chambers v.*



*Mississippi*, 410 U.S. 284, 295 (1973). See, e.g., *Washington v. Texas*, 388 U.S. at 23 n. 21 (right to present testimony may be limited by testimonial privilege or rules relating to mental ability to testify). When restrictions are placed on an accused's right to present evidence, they "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. at 56. Applying the foregoing principles, the Supreme Court held in *Rock* that a *per se* rule excluding the defendant's hypnotically refreshed testimony infringed his right to present a defense. The Supreme Court held that a "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." 483 U.S. at 61. While *Rock* concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony, we perceive no significant constitutional difference between the two. In either case, the Sixth Amendment right to present a defense is implicated.

Mil.R.Evid. 702 permits expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is subject to the relevance requirements of Mil.R.Evid. 401 and 402 and the balancing requirements of Mil.R.Evid. 403. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 597, 113 S.Ct. at 2798, the Supreme Court made the trial judge a gatekeeper, trusted with responsibility to decide if novel scientific evidence was sufficiently relevant and reliable to warrant admission.

An expert witness may not testify that a declarant was telling the truth, but may testify to the absence of indicia of deception. Thus, in *United States v. Cacy*, 43 MJ 214, 218 (1995), we held that it was not error to permit an expert to

testify that a victim's accusation did not appear to be feigned or rehearsed. Similarly, in *United States v. Suarez*, 35 MJ 374, 376 (CMA 1992), we held that it was not error for an expert to opine that counter-intuitive conduct, such as recanting an accusation, inconsistent statements, or failing to report abuse is not necessarily inconsistent with a truthful accusation. See also *United States v. Houser*, 36 MJ 392, 398-00 (CMA 1993). Finally, we have permitted experts to opine whether a complainant "can differentiate between fantasy and fact." *United States v. Palmer*, 33 MJ 7, 12 (CMA 1991); *United States v. Tolppa*, 25 MJ 352, 354-55 (CMA 1987), citing *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986). Under the same rationale as these cases, a properly qualified expert, relying on a properly administered polygraph examination, may be able to opine that an accused's physiological responses to certain questions did not indicate deception.

Polygraph examinations were relatively crude when *Frye* was decided. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 585, 113 S.Ct. at 2793. The Eleventh Circuit has recognized that, "[s]ince the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique." *United States v. Piccinonna*, 885 F.2d 1529, 1532 (11th Cir. 1989); see also *United States v. Galbreth*, 908 F. Supp. 877 (D. N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995). The effect of Mil.R. Evid. 707 is to freeze the law regarding polygraph examinations without regard for scientific advances. We believe that the truth-seeking function is best served by keeping the door open to scientific advances. See *United States v. Youngberg*, 43 MJ 379 (1995) (holding DNA evidence admissible); *United States v. Nimmer*, 43 MJ 252, 260 (1995) (remanding for hearing on reliability of hair analysis evidence). With respect to appellant's case, we, like the Fifth Circuit, cannot determine

"whether polygraph technique can be said to have made sufficient technological advance in the seventy years since *Frye* to constitute the type of 'scientific, technical, or other specialized knowledge' envisioned by Rule 702 and *Daubert*." *United States v. Posado*, 57 F.3d at 433. We will never know, unless we give appellant an opportunity to lay the foundation.

Like the Court in *Posado*, "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility." 57 F.3d at 434. Foundation evidence for proffered polygraph evidence must establish that the underlying theory—that a deceptive answer will produce a measurable physiological response—is scientifically valid. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 592–93. Furthermore, we would expect evidence that the theory can be applied to appellant's case. *Id.* The foundation must include evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.

As required by *Daubert*, the military judge must be a gatekeeper and weigh probative value against prejudicial impact in accordance with Mil.R.Evid. 403. We find the *Piccinonna* guidance apt:

[T]he trial court may exclude polygraph expert testimony because 1) the polygraph examiner's qualifications are unacceptable; 2) the test procedure was unfairly prejudicial or the test was poorly administered; or 3) the questions were irrelevant or improper. The trial judge has wide discretion in this area, and rulings on admissibility will not be reversed unless a clear abuse of discretion is shown.

885 F.2d at 1537; *see also United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996) (judge's ruling on admissibility of polygraph evidence reviewed for abuse of discretion).

This was not a private, *ex parte* examination under unknown conditions. *See United States v. Sherlin*, 67 F.3d 1208, 1217 (6th Cir. 1995) ("unilaterally" obtained and "privately commissioned" polygraph excluded). To the contrary, appellant proffers a government-initiated examination by an OSI examiner. Accordingly, there would appear to be no need to condition admissibility on having appellant examined by a polygraph examiner chosen by the prosecution. *See United States v. Piccinonna*, 885 F.2d at 1536.

Finally, the issues raised by the dissenting opinion warrant comment. Both *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984), involve polygraph examinations of prosecution witnesses, not the accused. Our holding, as was that in *Rock*, is limited to an accused's right to lay the foundation for a polygraph examination of himself. We need not and do not address admissibility of polygraph examinations of government witnesses or the question whether such polygraph evidence would be constitutionally required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). *But cf. United States v. Simmons*, 38 MJ 376 (CMA 1993) (trial counsel failed to discover and disclose contradictory statements of rape prosecutrix made to government polygrapher).

Furthermore, *Bartholomew* involves an issue different from the one in the case before us. It is summary disposition of a habeas corpus case, where the Supreme Court concluded that the Ninth Circuit misapplied the Court's *Brady* jurisprudence. 116 S.Ct. at 8. The Supreme Court noted that polygraph evidence was inadmissible under Washington state law, but premised its holding on the speculative nature of the



additional evidence that might have been discovered, counsel's concession "that disclosure would not have affected the scope of his cross-examination," and the "overwhelming" evidence of guilt. 116 S.Ct. at 10–11. The constitutionality of the state law was not before the Court and therefore, consistent with the Court's practice, it was not addressed. See *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 n. 22 (1947) ("It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied.'")

*Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), also involves a constitutional issue different from the one before us. *Egelhoff* involves legislative action redefining an element of an offense, not executive rule-making about modes of proof. The President, unlike the Montana legislature, lacks authority to create and define offenses. See Art. 36(a), UCMJ, 10 USC § 836(a); *United States v. Hemingway*, 36 MJ 349, 351 (CMA 1993); *United States v. Smith*, 13 USCMA 105, 119, 32 CMR 105, 119 (1962).

In *Egelhoff*, the Supreme Court upheld a statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue. The statute in question, Mont. Code Ann. § 45–2–203, provided that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." 116 S. Ct. at 2016. The Supreme Court's decision is fragmented, with four justices speaking in the plurality opinion, joined by Justice Ginsburg who concurred in the judgment separately; and four other Justices dissented in three separate opinions.

We read the holding in *Egelhoff* as founded on the power of the state to define crimes and defenses. The Montana statute was based on a legislative decision to resurrect "the common-law rule prohibiting consideration of voluntary intoxication" in determining whether the defendant had the requisite mens rea. 116 S.Ct. at 2020. In short, Montana decided to preclude voluntary intoxication from being asserted as a defense. The plurality explained:

"The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas*, 392 U.S. 514, 535–536 (1968) (plurality opinion). The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so, and the judgment of the Supreme Court of Montana to the contrary must be reversed.

116 S.Ct. at 2023–24.

The Montana rule excludes evidence based on the fact to be proven (voluntary intoxication) rather than on the mode of proof. Abolishing a defense is within the authority of a state legislature. On the other hand, Mil.R.Evid. 707 bars otherwise admissible and relevant evidence based on the mode of proof by categorically excluding polygraph evidence. While the plurality opinion in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n. 1, only four Justices joined in that observation.

Justice Ginsburg points out in her separate concurrence in *Egelhoff* that the statute does not appear among Montana's evidentiary rules, but in the chapter pertaining to substantive crimes. She opines that the Montana law is "a measure redefining *mens rea*," and as such is well within the power of a state to define crimes. 116 S. Ct. at 2024–25. The four Justices in the plurality opinion state that they are "in complete agreement" with Justice Ginsburg's analysis. They explain that they "address [the statute] as an evidentiary statute simply because that is how the Supreme Court of Montana chose to analyze it." 116 S. Ct. at 2020–21 n. 4. Justice Ginsburg, along with the four dissenters, recognized that "a rule designed to keep out 'relevant, exculpatory evidence' . . . offends due process." 116 S. Ct. at 2024, 2029.

Finally, we must comment on the dissenter's "floodgate" argument that our opinion will generate an unreasonable burden on the services.—MJ at (6–7). Apart from the speculative nature of such an argument, we think that it is just as likely that polygraph evidence will prevent needless litigation by avoiding some meritless prosecutions as well as smoking out bogus claims of innocent ingestion. Furthermore, we are unaware of any such flood of polygraph cases after our decision in *United States v. Gipson*, *supra*. Finally, our measure should be the scales of justice, not the cash register.

#### Decision

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is resumed to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty

and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC 867 (1989), will apply.

Chief Judge COX and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

I dissent for the reasons stated in my separate opinion in *United States v. Williams*, 43 MJ 348, 356–57 (1995) (Sullivan, C.J., concurring in the result).

CRAWFORD, Judge (dissenting):

We have held that "[t]he defendant has the right to present legally and logically relevant evidence at trial." *United States v. Woolheater*, 40 MJ 170, 173 (CMA 1994). But as all the Judges of this Court agreed in *Woolheater*, this is "not [an] absolute" right, *id.*; see also *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017, 2026 (1996); and may yield to valid "policy considerations," 40 MJ at 173; *id.*; *United States v. Bins*, 43 MJ 79, 83 (1995) (citing *Woolheater*, 43 MJ at 84); *United States v. Schaible*, 11 USCMA 107, 111, 28 CMR 331, 335 (1960).

None of the cases cited by the majority hold that there is a constitutional right to admit an exculpatory polygraph examination. Assuming polygraphs are relevant and reliable, there is ample justification for Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.). This justification satisfies the provisions of Article 36(a), Uniform Code of Military Justice, 10 USC 836(a), that the rules of procedure and evidence "generally recognized" in federal trials be applied to courts-martial "so far as he [The President] considers practicable."



Through dicta and implicit holdings the Supreme Court has signaled that there is no constitutional right to introduce polygraph evidence. Exclusion of exculpatory evidence does not contravene fundamental "principle[s] of justice . . . rooted in the traditions and conscience of our" society. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

In *McMorris v. Israel*, 643 F.2d 458 (1981), the Court of Appeals for the Seventh Circuit stated that "polygraph evidence [may be] materially exculpatory within the meaning of the Constitution." 643 F.2d at 462. In dissenting to the denial of *certiorari* in that case, then-Justice Rehnquist characterized *McMorris* as a "dubious constitutional holding." *Israel v. McMorris*, 455 U.S. 967, 970 (1982).

In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995), the Court summarily denied habeas corpus for the prosecution's failure to disclose information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The basis for the defense allegation was that the prosecution failed to reveal polygraph examinations and statements by the defendant's brother and his girlfriend, the two key prosecution witnesses at trial.<sup>1</sup> These polygraphs and their statements would have undermined the witnesses' testimony at trial and supported the defense theory.

The defendant's brother testified at trial that, while he and his brother sat in the car in the laundromat parking lot, the defendant said "that he intended to rob the laundromat and 'leave no witnesses.'" The prosecution offered evidence that both the brother and girlfriend left a short while later and went to the girlfriend's house. The girlfriend also testified that

<sup>1</sup>This Court in the past has looked at *Brady v. Maryland*, 373 U.S. 83 (1963), and its military counterpart as to its impact on prosecution witnesses as in *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and reversed a conviction. *United States v. Simmons*, 38 MJ 376, 380-82 (CMA 1993).

when the defendant arrived at her house, he told her that he "put two bullets in the kid's head." She also heard the defendant "say that he intended to leave no witnesses." 116 S.Ct. at 8-9.

At trial the defendant testified that he forced the attendant "to lie down on the floor." While removing the cash, he "accidentally fired" a bullet into the victim's head. The defendant "denied telling" his brother and the girlfriend "that he intended to leave no witnesses." Moreover, he said that his brother "assisted" him. 116 S.Ct. at 9.

Under Washington State law, polygraph evidence is inadmissible. *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984). Even so, prior to trial, the prosecution requested that the two key witnesses take a polygraph examination. The polygrapher noted that the girlfriend's answers to the "questions were inconclusive." The polygrapher asked the defendant's brother whether (1) he had "assisted" in the robbery, and (2) whether at any time he was with his brother in the laundromat. The examiner said that his negative responses showed "deception." The prosecution did not disclose these examinations to defense counsel. 116 S.Ct. at 9. In denying relief because of failure to disclose the polygraph examinations, the Supreme Court noted that, during the habeas corpus hearing, "counsel obtained no contradictions or admissions" from the defendant's brother. 116 S. Ct. at 11. Clearly, if polygraph examinations were admissible, polygraph results would have impeached the witnesses. *Thus, the results on appeal would have been different.*

The implicit holding in *Wood* has been reinforced in *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996). In *Egelhoff* the Supreme Court held that a state may exclude evidence of voluntary intoxication as it relates to the *mens rea* element of a criminal offense. When interpreting Supreme Court decisions, it is instructive and helpful to look beyond the

specific holding to the debate of broader principles of jurisprudence.

In *Egelhoff*, eight Justices agreed that there may be valid policy reasons to exclude relevant, reliable evidence. 116 S.Ct. at 2017, 2026. While the eight Justices debated the “*Chambers* principle,” *id.* at 2022, Justice Ginsburg, concurring in the judgment, looked “[b]eneath the labels” in concluding that a state legislature’s redefinition of *mens rea* “encounters no constitutional shoal.” *Id.* at 2024.

Justice Scalia, speaking for four other Justices, described *Chambers* as a “highly case-specific error correction” case as well as a “fact-intensive case.” He concluded that there is no violation of a defendant’s right of defense “whenever ‘critical evidence’ favorable to him is excluded”; on the other hand, “erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.” *Id.* at 2022. The plurality then emphasized that Fed.R.Evid. 403 and 802 result in exclusion of relevant, reliable evidence. *Id.* at 2017.

Justice O’Connor, dissenting and joined by three other Justices, agreed the “defendant does not enjoy an absolute right to present evidence relevant to his defense.” *Id.* at 2026. Her dissent rejected the plurality argument that because evidence of voluntary intoxication was excluded at common law, it should be excluded in this case. *Id.* at 2029–31. Justice O’Connor asserted that to exclude the evidence would prohibit a defendant from having a “fair opportunity to put forward his defense.” *Id.* at 2031. She emphasized that this concept was “universally applicable.” *Id.* at 2030. In any event, she concluded that the state had not set forth “sufficient justification,” *id.* at 2027, to exclude involuntary intoxication to negate the mental element of a defense. She agreed with Justice Ginsburg that a state could redefine an offense to render “voluntary intoxication irrelevant,” but concluded that the State of Montana did not evidence such an intent. *Id.* at

2031. Justice O’Connor also rejected the plurality’s characterization of *Chambers*. *Id.* at 2026–27.

Justice Souter agreed that the “plurality opinion convincingly demonstrates that . . . the common law . . . rejected the notion that voluntary intoxication might be exculpatory, or was at best in a state of flux. . . .” *Id.* at 2032 (citation omitted). Thus, a state may exclude even relevant and exculpatory evidence if it presents a valid justification for doing so.” *Id.* at 2032.

However, in separate opinions, Justices Breyer and Souter stated that the State of Montana had not provided for exclusion of voluntary intoxication from the *mens rea* element of an offense. In summary, in *Egelhoff* eight Justices of the Court recognized that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so.

Mil.R.Evid. 707 was “based on several policy grounds.” The policy grounds set forth in the Analysis are not exclusive. These grounds include the risk of being treated with “near infallibility”; “danger of confusion of the issues”; and a waste of time on collateral matters. Drafters’ Analysis, Manual, *supra* (1995 ea.) at A22–48.

An additional policy concern is the impact in terms of practical consequences. Unfortunately, the majority overlooks the practical consequences of its decision on a worldwide system of justice. Our Court sees the cases that are at the end of a long funnel. There are approximately 4,000 general courts-martial per year. Annual Report, 39 MJ CXLVII, CLIX, CLXXIV, CLXXVII (1992–93). However, across the services, there are approximately 100,000 criminal actions per year. Statistically more than 20 percent of these involve drug cases like the present case. The majority fails to recognize that a concomitant right of presenting polygraph evidence is the right to demand a polygraph examination during the investigative stage. This may well impose a practical



impossibility on the services. Additionally, if an individual were accused of a minor crime for which she was to be given a captain's mast, she could claim a right to a polygraph examination.<sup>2</sup> Thus, the practical policy consequences set forth in the analysis established a valid governmental interest in precluding admissibility of polygraph examinations. This rule is not inconsistent with the rule in the Federal courts.

Professors Giannelli and Imwinkelried state, "A majority of jurisdictions follow the traditional rule, holding polygraph evidence inadmissible per se." P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-3(A) at 232 (2d ed. 1993 and 1995) (citing many cases). Further, "[a] substantial minority of courts admit polygraph evidence upon stipulation of the parties." *Id.* § 8-3(B) at 236. But "[a] few courts recognize a trial court's discretion to admit polygraph evidence even in the absence of a stipulation." *Id.* § 8-3(C) at 240.

While the Federal courts are split as to admissibility of polygraphs, some, like *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995), have admitted polygraph evidence at suppression hearings or pursuant to a stipulation. *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989). This is not unlike admitting hearsay at suppression hearings. In any event, the Federal courts have not faced the issue of a rule precluding admissibility of polygraph evidence in a worldwide system of justice. California, which does have a rule similar to the military and applies the *Kelly-Frye* (so named after *People v. Kelly*, 549 P.2d 1240 (Cal. 1976), and

<sup>2</sup>See e.g., *United States v. Bass*, 11 MJ 545 (ACMR 1981) (refusal to accept Article 15 resulted in a general court-martial and 8 years' confinement. There have been other instances where Article 15s have resulted in more serious dispositions. See, e.g., *United States v. Brock*, No. 96-0673, pet. granted (July 12, 1996); *United States v. Zamberlan*, 44 MJ 69 (1996).

*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) test, has held that there is no constitutional right to introduce exculpatory polygraph examinations. See, e.g., *People v. Kegler*, 197 Cal. App. 3d 72, 84-90, 242 Cal. Rptr. 897, 905-09 (1987).

Since Mil.R.Evid. 707 is based on valid policy grounds, it satisfies the Constitution and the requirement in Article 36(a) that the rules of procedure and rules of evidence conform to those in Federal trials "so far as he [The President] considers practicable." If one carried the view of the majority to its logical conclusion, it calls into question various procedural and evidentiary rules. See, e.g., Mil.R.Evid. 502-12 and 803(6); RCM 305(h)(2)(B). Unfortunately this path reminds me of earlier forays by this Court. See, e.g., *United States v. Larnear*, 3 MJ 76, 80, 83 (1977); *United States v. Heard*, 3 MJ 14, 20 n.12 (1977); *United States v. Hawkins*, 2 MJ 23 (1976); *United States v. Washington*, 1 MJ 473, 475 n.6 (1976). But see *United States v. Newcomb*, 5 MJ 4, 7 (CMA 1978) (Cook, J., concurring).

To the extent the majority suggests that *Egelhoff* is distinguishable because it involves a legislative act rather than rulemaking by an executive, I have two responses. First, just as the Supreme Court treats Federal Rules of Criminal Procedure the same as statutes, so should we. See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Second, in *Loving v. United States*, 116 S. Ct. 1737, 1748 (1996), the Supreme Court recognized that the President as Commander-in-Chief has been delegated "wide discretion and authority." The Court upheld the delegation of authority to the President to promulgate aggravating factors in a death penalty case. *Loving* left open the question the extent of The President's authority under Article 36 alone. *Id.* at 1749.

For the aforementioned reasons, I dissent.

**APPENDIX B**

UNITED STATES

v.

Airman Edward G. SCHEFFER,  
FR554-85-0300, United States Air Force

ACM 30304

U.S. Air Force Court of Criminal Appeals

Sentence Adjudged 17 Oct. 1992

Decided 5 Jan., 1995

Accused was convicted by general court-martial, H. Martin Jayne, J., of making and uttering checks without sufficient funds, wrongfully using methamphetamine, failing to go to appointed place of duty, and unauthorized absence, and he appealed. The United States Air Force Court of Criminal Appeals, Young, J., held that: (1) President was within his authority in refusing to admit polygraph examinations; (2) accused was entitled to one-day pretrial confinement credit against his sentence; and (3) trial was begun within required 120 days.

Affirmed as modified.

Pearson, J., filed opinion concurring in part and dissenting in part with which Schreier, J., joined.

**1. Military Justice — 510**

Military Rules of Evidence and all other provisions of Manual for Courts-Martial are accorded force of law, unless they conflict with Uniform Code of Military Justice (UCMJ). Military Rules of Evid., Rule 707.

**2. Military Justice — 510**

Military Rule of Evidence will not be declared unconstitutional absent clear showing that President exceeded discretionary powers conferred on him. Military Rules of Evid., Rule 707(a).

**3. Military Justice — 527**

Military members are afforded protections guaranteed by United States Constitution, except for those which are expressly or by necessary implication inapplicable.

**4. Constitutional Law — 278.6(2)****Military Justice — 530, 1124**

Both right to due process under Fifth Amendment and right to compulsory process under Sixth Amendment apply to service members at courts-martial. U.S.C.A. Const. Amends. 5, 6.

**5. Military Justice — 1124**

In military cases, evidence is constitutionally required if it is relevant, martial, and favorable to defense.

**6. Military Justice — 1025, 1124**

For purposes of determining whether evidence is admissible, evidence is "relevant" if it is vital to defense when evaluated in context of entire record.

See publication Words and Phrases for other judicial constructions and definitions.



**7. Military Justice ○ 1026**

Evidence, though relevant, may be inadmissible if other legitimate interests in criminal trial process outweigh need to present relevant evidence based on close examination of competing interests.

**8. Military Justice ○ 1026, 1124**

Close examination of competing interests is required if rule on admissibility of evidence significantly diminishes accused's right to present evidence and cross-examine witnesses against him.

**9. Military Justice ○ 1020**

To be admissible, scientific evidence must be relevant, its probative value must not be substantially outweighed by danger of unfair prejudice or potential for confusion, and it must assist trier of fact in understanding evidence or determining fact in issue.

**10. Military Justice ○ 1025, 1124**

For purposes of examining constitutional challenges to rules of evidence which prohibit accused from presenting evidence, court considers whether testimony is relevant and vital to defense in context of entire record, whether rule arbitrarily limits accused's ability to present reliable evidence, whether rule arbitrarily limits admission by defense to greater degree than by prosecution, and whether rule arbitrarily infringes on rights of accused to testify on his own behalf.

**11. Military Justice ○ 510, 1023**

President's prohibition of admission of polygraph evidence is constitutionally permissible exercise of authority to prescribe modes of proof for trials by courts-martial.

**12. Military Justice ○ 1023**

While polygraph evidence may be relevant to credibility of witness, it is not necessarily vital to assessment of credibility and thus not automatically admissible.

**13. Military Justice ○ 1023**

President's decision not to admit polygraph evidence was not arbitrary in light of valid concerns of reliability of any particular polygraph evidence.

**14. Military Justice ○ 510, 1023**

Fact that military judges are often called on to resolve issues similar to those concerns expressed in promulgating rule on admissibility of polygraph evidence or that Department of Defense uses polygraph as investigative tool does not bar President from determining that probative value of polygraph evidence is substantially outweighed by other factors. Military Rules of Evid., Rule 707.

**15. Military Justice ○ 510, 1023**

While it might be arbitrary for President to promulgate rule which prohibits admission of evidence which is assigned to top scientific class, polygraph evidence is not such evidence, and it is not arbitrary to prohibit admission of techniques which fall into middle or bottom classes which are by definition less reliable. Military Rules of Evid., Rule 707(a).

**16. Constitutional Law ○ 278.6(2)****Military Justice ○ 1023**

Military Rule of Evidence prohibiting presentation of

polygraph evidence, whether in favor of accused or of prosecution, did not unconstitutionally infringe on accused's right to due process and to present defense. Military Rules of Evid., Rule 707.

#### 17. Military Justice ☞ 940

Person arrested without warrant must be given prompt judicial determination of probable cause as prerequisite to pretrial detention. R.C.M. 305(d, h).

#### 18. Military Justice ☞ 936

Probable cause determinations made more than 48 hours after arrest are presumptively untimely and burden shifts to government to show existence of bona fide emergency or other extraordinary circumstance justifying delay. R.C.M. 305(d, h).

#### 19. Military Justice ☞ 936, 940

When accused's official custody is not at direction of military authority and military makes reasonably diligent efforts to secure physical custody over accused, the 48-hour period after arrest in which probable cause determination must be made does not begin until commander actually orders accused into pretrial confinement.

#### 20. Military Justice ☞ 936, 940

Even if 48-hour period for showing probable cause began when military authority requested accused be detained in Iowa, military exigencies of getting accused back to Air Force Base overcame presumption that probable cause determination was untimely.

#### 21. Military Justice ☞ 938.1

Commander was neutral and detached, for purposes of initial confinement order and decision to continue confinement, even though commander later preferred charges against accused, absent evidence of record to suggest that commander was either directly or particularly involved in command's law enforcement function.

#### 22. Military Justice ☞ 939, 1324

Although commander lacked probable cause to place accused in pretrial confinement, after commander filed memorandum there was support for decision to retain confinement, and thus accused was entitled to credit of one-day pretrial confinement against his sentence.

#### 23. Military Justice ☞ 1170, 1172

Regardless of rule that accused be brought to trial within 120 days of preferral of charges, imposition of restraint, or entry on active duty, prosecution must take immediate steps to bring accused to trial. R.C.M. 707(a).

#### 24. Military Justice ☞ 1176, 1177

Prosecution was timely where 34-day delay was at accused's request and accused was brought to trial on 120th day, not counting 34-day delay, from date of his initial apprehension.

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Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, and Captain Del Grissom.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Captain Jane M.E. Peterson.

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EN BANC DIXON, SNYDER, RAICHLE, HEIMBURG, YOUNG, PEARSON, SCHREIER, GAMBOA, and BECKER, JJ.

## OPINION OF THE COURT

YOUNG, Judge:

Contrary to his pleas, appellant was convicted of making and uttering 17 checks, totaling over \$3,300, without sufficient funds in his account, wrongfully using methamphetamine, failing to go to his appointed place of duty, and a 13-day unauthorized absence. Articles 123a, 112a, and 86, UCMJ, 10 U.S.C. §§ 923a, 912a, 886 (1988). Court members sentenced him to a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to E-1. Appellant assigns three errors: (1) the military judge erred by refusing to admit into evidence the results of appellant's exculpatory polygraph examination; (2) the charges should have been dismissed for lack of a speedy trial; and (3) appellant is entitled to 5 days credit because his pretrial confinement was not reviewed by a neutral and detached magistrate within 48 hours of incarceration. We order appellant be given credit for 1 day of illegal pretrial confinement. We find no error which affects the findings or sentence.

### I. Admissibility of Polygraph Results

#### A. Facts

Appellant, apparently on his own initiative, agreed to assist the Air Force Office of Special Investigations (AFOSI) with drug investigations. His AFOSI handler advised appellant that from time to time they would ask him to provide urine specimens to be tested for drugs and to submit to polygraph examinations. On 7 April 1992, AFOSI Special

Agent Shilaikis asked appellant if he would consent to a urinalysis. Appellant agreed, but declined to provide a urine sample until the following day. He claimed he only urinated one time a day, and he had already done so. He asked for, and received permission to continue his undercover work that evening. The following day, he provided a urine specimen. On 10 April 1992, appellant took an AFOSI polygraph. During the examination, appellant answered "no" to the following relevant questions:

- (1) Since you've been in the AF, have you used any illegal drugs?
- (2) Have you lied about any of the drug information you've given OSI?
- (3) Besides your parents, have you told anyone you're assisting OSI?

The examiner opined that appellant's polygraph charts "indicated no deception to the above questions." On approximately 14 May 1992, the AFOSI agents learned appellant's urine specimen had tested positive for methamphetamine.

#### B. The Issue

At trial, appellant moved to admit the results of the polygraph despite the proscription of Mil.R.Evid. 707; the prosecution objected. The military judge ruled that the Constitution did not prohibit the President from promulgating a rule excluding polygraph evidence from admission in trials by courts-martial, and he denied appellant's request to lay a foundation for its admission. Appellant testified on his own behalf and denied knowingly using methamphetamine.

Mil.R.Evid. provides:

- (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a

polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

According to the drafters' analysis, Mil.R.Evid. 707 is based on the following policy grounds: (1) the "danger court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility'" (quoting *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975)); (2) "to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted" (*Id.*); (3) the danger of confusion of the issues which "could result in the court-martial degenerating into a trial of the polygraph machine"; (4) presentation of polygraph evidences "can result in a substantial waste of time when collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; (5) "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system." *Manual for Courts-Martial, United States*, 1984, App. 22 at A22-46 (1994 ed.); see *United States v. Helton*, 10 M.J. 820 n. 10 (A.F.C.M.R. 1981) (concise description of the complex combination of theory, precise measurement techniques, and subjective interpretation required to support validity of polygraph).

*C. Presidential Authority to Promulgate  
Mil.R.Evid. 707(a)*

The Constitution vests in Congress the power to make

rules "for the Government and Regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 14. The Constitution also gives Congress the power to make all laws necessary to execute this power. U.S. Const. art. I, § 8, cl. 18. Congress executed this power by enacting the Uniform Code of Military Justice (UCMJ). In the UCMJ, Congress delegated to the President the authority to prescribe the modes of proof before trials by courts-martial, "in regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]." Article 36(a), UCMJ, 10 U.S.C. § 836(a) (1994). Article 36(a) is unquestionably a valid Congressional delegation. See *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118-19, 1962 WL 4459 (1962); accord *United States v. Weiss*, 36 MJ 224, 238 (C.M.A. 1992) (Crawford, J., concurring in the result), *aff'd*, — U.S. —, 114 S.Ct. 752, 127 L.Ed.2d. 1 (1994).

Pursuant to Article 36(a), UCMJ, the President promulgated Mil.R.Evid. 707, and the Manual for Courts-Martial in which it is found. See Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991). Thus, the question we must resolve is rather narrow in scope. It is not whether polygraph examinations should be admissible in trials by courts-martial, but whether the President may constitutionally prohibit their admission.

[1, 2] "[O]ne of the first principles of constitutional adjudication [is the] basic presumption of the constitutional validity of a duly enacted state or federal law." *Lemon v. Kurtzman*, 411 U.S. 192, 208, 93 S.Ct. 1463, 1473, 36 L.Ed.2d 151 (1973) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60, 93 S.Ct. 1278, 1311, 36 L.Ed.2d 16 (1973) (Stewart, J., concurring)). We must accord Mil.R.Evid. 707, and all other provisions of the Manual for



Courts-Martial, the force of law, unless it conflicts with the UCMJ. *Noyd v. Bond*, 395 U.S. 683, 692, 89 S.Ct. 1876, 1882, 23 L.Ed.2d 631 (1969); *Smith*, 32 C.M.R. at 119. Accordingly, we will not declare Mil.R.Evid. 707(a) unconstitutional in the absence of a clear showing that the President exceeded the discretionary powers conferred upon him by Article 36(a). *United States v. White*, 3 U.S.C.M.A. 666, 14 C.M.R. 84, 88, 1954 WL 2095 (1954).

#### *D. The Rights to Due Process and Compulsory Process*

[3, 4] Military members are afforded the protections guaranteed by the United States Constitution, except for those which are expressly or by necessary implication inapplicable. *United States v. Stombaugh*, 40 M.J. 208 211-12 (C.M.A. 1994). Both the right to due process under the Fifth Amendment and the right to compulsory process under the Sixth Amendment apply to service members at courts-martial. *Stombaugh*, 40 M.J. at 212; *United States v. Graf*, 35 M.J. 450, 454 (C.M.A. 1992), *cert. den.*, — U.S. —, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994).

[5] The Supreme Court has held that evidence is constitutionally required if it is relevant, material, and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). The Court of Military Appeals has “unequivocally” adopted this holding for military cases. *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (citing *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983)).

[6] The Military Rules of Evidence have combined the common law concepts of relevance and materiality into one rule of relevance. See S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 422 (3d ed. 1991).

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Mil.R.Evid. 401. But, in analyzing relevance, we still must confront two questions: (1) Does the evidence have any tendency to make the existence of any fact more or less probable?; and (2) Is that fact of consequence to a determination of appellant’s guilt?

What “favorable to the defense” means has been the subject of varying opinions; however, the Supreme Court specifically rejected the “conceivable benefit” test. “If we require only a showing that a witness could provide some ‘conceivable benefit’ to the defense, then ‘the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.’” *Williams*, 37 M.J. at 361 (Gierke, J., concurring) (quoting *Valenzuela-Bernal*, 458 U.S. at 866-67, 102 S.Ct. at 3446). It appears the Supreme Court requires that the evidence be “vital to the defense” when “evaluated in the context of the entire record.” *Valenzuela-Bernal*, 458 U.S. at 867-68, 102 S.Ct. at 3446-47.

[7, 8] “Of course, the right to present relevant testimony is not without limitation. The right ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’” *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973)). Procedural and evidentiary rules to control the presentation of evidence which are “designed to assure both fairness and reliability in the ascertainment of guilt and innocence” are premissible. *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049; see *Washington v. Texas*, 388 U.S. 14, 23 n. 21, 87 S.Ct. 1920, 1925 n. 21, 18 L.Ed.2d 1019 (1967).

But, when the rule denies or significantly diminishes appellant's right to present evidence or to confront and cross-examine the witnesses against him, the competing interests must be closely examined. *Chambers*, 410 U.S. at 295, 93 S.Ct. at 1046 (citing *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969)). As *Rock*, *Chambers* and *Washington* are the most relevant Supreme Court cases to this inquiry, we will examine them in some detail.

#### *E. The Case Law*

Washington was convicted of murdering his former paramour's new boyfriend. Washington testified that a man named Fuller actually did the shooting and that he had tried to stop Fuller. Fuller, who had already been convicted of the murder, would have corroborated Washington's testimony, but his testimony was barred under Texas law. Two Texas statutes provided that persons charged or convicted as co-participants in the same crime could not testify for one another. The Supreme Court held that Washington was "denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23, 87 S.Ct. at 1925. The exclusion of this testimony was clearly arbitrary because it applied only to the defense, did not apply if the accomplice had been acquitted at his own trial, and "leaves [the accomplice] free to testify when he has a great incentive to prejury, and bars his testimony in situations where he has a lesser motive to lie." *Id.*

Chambers was convicted of murdering a policeman, Office Liberty. McDonald, who was at the scene of the

shooting, provided Chambers' attorneys with a signed, sworn confession to shooting the policeman with his own pistol which he subsequently discarded. McDonald also admitted to telling a friend that he had done the shooting. McDonald later repudiated his confession. At trial, a friend of McDonald testified that he saw McDonald shoot the victim. A cousin of the victim testified that right after the shooting he saw McDonald with a pistol in his hand. When the State chose not to call McDonald, Chambers did. McDonald admitted confessing to the murder and his written confession was introduced. On cross-examination by the State, McDonald stated that he had recanted, he did not commit the murder, and he had only confessed because of promises that he would not go to jail and would share in a sizable tort recovery. The judge denied Chamber's motion to examine McDonald as an adverse witness because the State's "voucher" rule prevented a party from impeaching its own witness.

Chambers called three of McDonald's friends to testify. Hardin testified that on the night of the murder, McDonald admitted killing the victim. The judge sustained the State's objection that the testimony was hearsay and told the jury to disregard it because the State did not recognize declarations against penal interests as an exception to the hearsay rule. Turner testified, contrary to McDonald, that he was not with McDonald at the time of the shooting. The judge sustained the prosecution's hearsay objection to Turner's testimony that McDonald had admitted shooting the victim and had later asked Turner not to implicate him in the murder. Carter had been McDonald's friend for about 25 years. The day after the murder, McDonald told Carter he had killed Office Liberty and disposed of the weapon. The judge refused to permit Carter to testify before the jury. Thus, as a result of the "party witness" or "voucher" rule and the State's hearsay rule, Chambers was "unable either to cross-examine McDonald or to present witnesses in his own behalf who would have



discredited McDonald's repudiation and demonstrated his complicity." *Chambers*, 410 U.S. at 294, 93 S.Ct. at 1045. The Supreme Court held that Chambers was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment because (1) the application of the "voucher" rule deprived him of the opportunity to contradict testimony that was clearly adverse, and (2) the trial judge erred by excluding reliable, corroborated, hearsay evidence critical to Chambers' defense. The Court made clear that such rules of evidence were not *per se* unconstitutional. They are unconstitutional only to the extent their application denies an accused a fair trial.

Rock shot her husband to death. When police arrived on the scene, Rock told them her husband had choked her and thrown her against the wall, she had picked up the pistol, appellant hit her again, and she shot him. Because she could not remember the exact details of the shooting, Rock's attorney suggested she submit to hypnosis in order to refresh her memory. During the two hypnosis sessions, Rock did not relate any new information; however, after the hypnosis, she remembered that her finger was not on the trigger, and the gun had discharged when her husband grabbed her arm during the scuffle. As a result, the pistol was examined by an expert who opined that the gun was defective and prone to fire when hit or dropped. The Arkansas rules of evidence barred all testimony that had been hypnotically refreshed. Upon motion by the prosecution, the judge limited Rock's testimony to the sketchy notes the hypnosis expert had made of her pre-hypnosis description of the shooting. The Supreme Court held that a *per se* rule which resulted in excluding the testimony of a hypnotically refreshed accused impermissibly infringed the right of an accused to testify on her own behalf. *Rock*, 483 U.S. at 62, 107 S.Ct. at 2714. The Court declined to express an opinion as to the constitutionality of a rule that would prohibit the hypnotically refreshed testimony of witnesses

other than criminal defendants. *Rock*, 483 U.S. at 58, n. 15, 107 S.Ct. at 2712 n. 15.

[9] In the early years of the UCMJ, the *per se* exclusion of polygraph evidence was established by case law. See *United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138, 144, 1955 WL 3296 (1955); *United States v. Pryor*, 2 C.M.R. 365, 370-71, 1951 WL 2249 (A.B.R. 1951). No doubt based on this early case law, the President prohibited the admission into evidence of conclusions based upon polygraph tests in the *Manual for Courts-Martial, United States, 1969 (Rev.)*, ¶ 142e. See Department of the Army Pamphlet 27-2, *Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition*, at 27-14 (1970). On 12 March 1980, the President substituted the Military Rules of Evidence for the evidentiary rules formerly contained in Chapter XXVII of the *Manual for Courts-Martial*. Exec. Order 12198, 45 Fed. Reg. 16,945 and 16,993 (1980). The new rules, based on the Federal Rules of Evidence, did not prohibit polygraph evidence and provided a new way of looking at expert evidence. See *United States v. Gipson*, 24 M.J. 246, 250-52 (C.M.A. 1987); accord *Daubert v. Merrell, Dow Pharmaceuticals, Inc.*, — U.S. —, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Gone was the test of *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), which required the proponent of scientific evidence to establish, as a foundation, that the evidence was of a type generally accepted in the scientific community. In its place, the President promulgated Mil.R.Evid. 401, 402, 403, and 702. See *United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993); *Gipson*, 24 M.J. at 251. To be admissible, the scientific evidence must be relevant (Mil.R.Evid. 401 and 402); its probative value must not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Mil.R.Evid. 403); and

must "assist the trier of fact to understand the evidence or to determine a fact in issue" (Mil.R.Evid. 702). Of course, in evaluating whether the evidence is probative and helpful to the fact finder, the military judge should consider the degree of acceptance in the scientific community. *Gipson*, 24 M.J. at 252.

In *Gipson*, the Court of Military Appeals divided scientific evidence into three classes: (1) evidence for which "the principles underlying the expertise are so judicially recognized that it is unnecessary to reestablish those principles in each and every case, such as fingerprints, ballistics, or x-ray evidence; (2) evidence for which the principles can neither be accepted nor rejected out of hand; and (3) evidence based on practices and techniques that "have been so universally discredited that a trial judge may safely decline even to consider them, as a matter of law." *Gipson*, 24 M.J. at 249. The Court assigned the polygraph to the middle class and specified several reasons which precluded assigning it to the top class of scientific evidence: (1) criticism of the scientific principles on which the polygraph and the polygrapher's opinion is based; (2) the importance of the precision of the questions, the way the examiner intended them, and the examinee understood them; (3) the examinee's state of mind; and (4) other conditions such as whether the examinee was taking medications, illegal drugs, or attempting countermeasures to control the physical responses to be recorded by the polygraph. *Gipson*, 24 M.J. at 248-49; see 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence*, § 8-3(A) (2d ed. 1993) (the authors' formulation of the issues: "the lack of empirical validation, the numerous uncontrollable factors involved in the examination, the subjective nature of the deception determination, and the absence of adequate standards for assessing the qualifications of examiners.") *Helton*.

Despite the Court's concerns, it held that polygraph evidence was not *per se* inadmissible and an accused is entitled to attempt to lay foundational predicates for its admission. Of course, admissibility would depend on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and other factors. *Gipson*, 24 M.J. at 252-53. By adopting Mil.R.Evid. 707, the President overruled *Gipson* as it applied to polygraph evidence.

The President promulgated Mil.R.Evid. 707 on June 27, 1991, to apply to all cases in which arraignment had been completed on or after 6 July 1991. Exec. Order 12,767, 56 Fed.Reg. 30,284 (1991). The Army Court of Military Review is the only appellate court to have directly addressed the constitutionality of this rule. See *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994). In *Williams*, the accused admitted misappropriating three of eighteen unauthorized disbursements from the Chaplain's Fund and "passed" a polygraph exam which focused on other unauthorized disbursements. Williams claimed that the trial court's decision not to admit the polygraph evidence "impacted greatly" on his decision not to testify before findings. *But see Gipson*, 24 M.J. at 253 (Court of Appeals "would not condone [the admission of] such opinion testimony absent the examinee's consistent testimony"). Nevertheless, the Army Court examined the reasons the drafters gave for the rule. The Court found several of those reasons to be "in the nature of matters that are routinely resolved by trial judges under Mil.R.Evid. 403," and the final reason (concerns about reliability) to be "in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make in polygraph examinations—not to mention observation in *Gipson* that '[t]he greater weight of authority indicates that [the polygraph] can be a helpful scientific tool.'" *Williams*, 39 M.J. at 555 (quoting *Gipson*, 24



M.J. at 249). Based on its reading of *Washington, Chambers*, and *Rock*, the Court went on to hold, "under the facts presented," the appellant's

Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard of these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil.R.Evid. 707.

*Williams*, 39 M.J. at 555. Although the Army Court appears to have restricted its opinion to the facts of the case, we are unable to discern what circumstances would trigger a different result.

#### F. Analysis

[10] We believe the case law suggests a framework for examining constitutional challenges to rules of evidence which prohibit an accused from presenting evidence:

- (1) The testimony must be relevant under Mil.R.Evid. 401 and 402 and vital to the defense when evaluated in the context of the entire record. If the evidence is either irrelevant or not vital to the defense, there is no constitutional right to present it.
- (2) The rule of evidence may not *arbitrarily* limit the accused's ability to present reliable evidence.
- (3) If the rule permits the admission of the evidence for some purpose, but not for others, it may not *arbitrarily* limit admission by the defense to a greater degree than by the prosecution.
- (4) The rule of evidence must not *arbitrarily* infringe on the right of the accused to testify on his own behalf.

[11] Applying these principles, we hold that the President's prohibition of the admission of polygraph evidence in Mil.R.Evid. 707(a) was a constitutionally permissible exercise of his Article 36(a), UCMJ, authority to prescribe modes of proof for trials by courts-martial.

[12] (1) The Court of Military Appeals has held that polygraph evidence may be relevant to the credibility of a witness. We will assume appellant's credibility was relevant and vital to his defense. See *Rodriguez*, 37 M.J. at 452; *Gipson*. However, we do not believe presentation of polygraph evidence was vital to the court member's assessment of appellant's credibility.

[13-15] (2) Mil.R.Evid. 707 does not arbitrarily limit the accused's ability to present reliable evidence.

(a) A rule is arbitrary if it is "determined by chance, whim, or impulse, and not by necessity, reason, or principle." *The American Heritage Dictionary of the English Language* 94 (3d ed. 1992). The President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning. The Court of Military Appeals noted still valid concerns about the soundness of the underlying principles of the technique and the reliability of any particular polygraph evidence. *Gipson*, 24 M.J. at 248-49. That is why the Court assigned polygraph results to the middle class of scientific evidence. The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the probative value of the evidence. See *Helton*, 10 M.J. at 824 n. 15 (citing *United States v. Urquidez*, 356 F.Supp. 1363 (C.D.Cal.1973) (experience of District Judge in hearing 3 days of foundational evidence)).

(b) We are unwilling to follow the Army Court of Military Review's holding in *Williams*. The fact that military

judges are often called upon to resolve issues similar to some of the concerns expressed by the drafters of Mil.R.Evid. 707, or that the Department of Defense uses the polygraph as an investigative tool, does not bar the President from determining that the probative value of polygraph evidence is substantially out-weighted by other more compelling factors. The *Gipson* decision made sense in the absence of a rule prohibiting the admission of polygraph evidence. The Court of Military Appeals established the method for resolving the admission of all manner of scientific evidence, not just polygraph evidence—let the military judge hold an evidentiary hearing and render a decision. But, we believe the drafters' concerns for admitting polygraph evidence are significant enough for the President, exercising his Article 36(a), UCMJ, authority, to formulate a rule of evidence excluding it from courts-martial.

(c) "The first case to reject the admissibility of polygraph results was *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)." *Gipson*, 24 M.J. at 250. Over the years since *Frye*, the admissibility of polygraph evidence has been continually litigated in the federal courts, both on direct appeal and in *habeas corpus* actions. Nevertheless, we have been unable to locate any federal case, before or after the promulgation of the Federal Rules of Evidence, which suggests that the federal rule, or any similar state rule, unconstitutionally interferes with an accused's rights to due process or to present a defense.

(d) Furthermore, Mil.R.Evid. 707 applies a rule of evidence generally recognized by the federal courts. While not a part of the Federal Rules of Evidence, most of the federal circuit courts of appeal still hold that polygraph evidence cannot be introduced into evidence to establish the truth of statements made during the polygraph examination. See *United States v. Bounds*, 985 F.2d 188, 192 n. 2 (5th Cir.1993); *United States v. A & S Council Oil Co.*, 947 F.2d

1128 (4th Cir. 1991); *United States v. Lynn*, 856 F.2d 430 (1st Cir.1988); *United States v. Bowen*, 857 F.2d 1337 (9th Cir.1988); *United States v. Hall*, 805 F.2d 1410, 1416 (10th Cir.1986); *United States v. Cardarella*, 570 F.2d 264 (8th Cir.1978); see also *United States v. Rea*, 958 F.2d 1206, 1224 (2d Cir.1992) (Court had "intimated in past" that results not admissible, so trial judge did not abuse his discretion in ruling that polygraph was not sufficiently reliable to warrant admission); *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir.1989) (trial judge has discretion to admit polygraph evidence when both parties stipulate in advance as to circumstances of the test and the scope of admissibility and, subject to three preliminary conditions, to impeach or corroborate the testimony of a witness at trial. The three conditions are: adequate notice to opposing party, opposing party given reasonable opportunity to have subject tested by own expert using substantially the same questions, and whether used to impeach or corroborate, admissibility is governed by the Federal Rules of Evidence, including Fed.R.Evid. 608. "Even where the above three conditions are met, admission of polygraph evidence for impeachment or corroboration purposes is left entirely to the discretion of the trial judge." 885 F.2d at 1536).

(e) While it might be arbitrary for the President to promulgate a rule which prohibits the admission of evidence which is assigned to the top scientific class, such as fingerprint evidence, we do not believe it is arbitrary to prohibit those techniques which fall into the middle or bottom classes, which by definition are less reliable. See *Gipson*, 24 M.J. at 249.

(3) The Mil.R.Evid. 707(a) prohibition on the admission of evidence is comprehensive and equally applicable to both the prosecution and the defense.

(4) Mil.R.Evid. 707(a) did not infringe on the right of the accused to testify on his own behalf.



[16] We believe Mil.R.Evid. 707 is a premissible rule "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049. We, therefore, reject the Army Court's reasoning in *Williams* and hold that Mil.R.Evid. 707 did not unconstitutionally infringe on appellant's rights to due process and to present a defense. Accordingly, the military judge did not err in preventing appellant from laying a foundation for the admission of polygraph evidence.

## II. *County of Riverside v. McLaughlin* Credit

On 13 May 1992, near Centerville, Iowa, an Iowa State Police officer apprehended appellant for speeding and driving on a suspended license. Appellant told the officer he was on leave from March Air Force Base. The officer called the squadron and discovered that appellant was absent without leave. The squadron first sergeant asked the officer to detain appellant until military personnel could escort him back to the base. On 15 May, a military escort, accompanied appellant back to March Air Force Base, where appellant's commander ordered him into pretrial confinement at 0030, 16 May. On 18 May, the commander completed a written memorandum, in accordance with R.C.M. 305(h)(2), concluding there was probable cause to believe appellant committed several named offenses under the UCMJ, and determining that continued pretrial confinement was necessary. On 20 May, the areas defense counsel asked for a delay until 28 May in the pretrial confinement hearing to be conducted by a military magistrate. On 28 May, the military magistrate conducted the hearing and ordered appellant's confinement continued.

[17, 18] A person arrested without a warrant must "be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention." *United States v. Rexroat*, 38 M.J. 292, 294 (C.M.A.1993) (citing *Gerstein v. Pugh*, 420

U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)), *cert. denied*, — U.S. —, 114 S.Ct. 1296, 127 L.Ed.2d 648 (1994). "[P]robable cause determinations made after 48 hours of arrest are presumptively untimely," and "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Rexroat*, 38 M.J. at 294 (quoting *County Riverside v. McLaughlin*, 500 U.S. 44, 57, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991)). "If military exigencies prevent completion of probable-cause review within 48 hours, the fact of these exigencies may be used to rebut the presumption." *Rexroat*, 38 M.J. at 295–96. If the commander's probable cause determination, made under either R.C.M. 305(d) or (h), is made within 48 hours, and the commander is neutral and detached, then *Gerstein* and *McLaughlin* are satisfied. *Rexroat*, 38 M.J. at 298.

[19, 20] We first must decide when the *McLaughlin* 48 hours started to run—upon appellant's apprehension in Iowa or some later time. The Court of Military Appeals has ruled that the 48 hours starts at the time the commander actually orders the service member into pretrial confinement, not the time he was taken into custody. *Rexroat*, 38 M.J. at 295. When the accused's official custody is not at the direction of military authority and the military makes reasonably diligent efforts to secure physical custody over him and order him into pretrial confinement, we believe it does not make sense to start the clock until the commander actually orders him into pretrial confinement. Thus, we consider the 48-hour clock to have started at 0030, 16 May 1992. Even if the clock started when military authority requested appellant be detained in Iowa, we believe the military exigencies of getting him back to March Air Force Base overcame the *McLaughlin* presumption that the probable cause determination was untimely. *Rexroat*, 38 M.J. at 295–96.

[21] Next, we must determine if appellant's commander was "neutral and detached," such that either his initial confinement order or decision to continue confinement satisfies *Gerstein* and *McLaughlin*. Although the commander later preferred charges against appellant, there is no evidence of record to suggest he was "directly or particularly involved in the command's law enforcement function." *United States v. McLeod*, 39 M.J. 278 (C.M.A.1994) (quoting *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A.1982)); see *United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992). Therefore, we hold the commander was neutral and detached.

[22] Finally, we must determine whether the commander had probable cause to place appellant into pretrial confinement. The prosecution did not present any evidence to show what information the commander had before him when he ordered appellant into pretrial confinement. Therefore, we are unable to conclude that, at the time he ordered appellant into pretrial confinement, the commander had probable cause to believe that appellant had committed an offense under the UCMJ, and that pretrial confinement was required by the circumstances. See R.C.M. 304(c); *Courtney v. Williams*, 1 M.J. 267 (C.M.A.1976). However, we find the commander's memorandum of his decision to retain appellant in confinement, dated 18 May, amply complies with *Gerstein* and R.C.M. 305(h)(2)(B). The prosecution failed to present evidence from which we could conclude that this memorandum, or the decision on which it was based, was accomplished within 48 hours (by 0030, 18 May). Although R.C.M. 305(k) does not specifically speak to the *McLaughlin* rule, we believe it is appropriate to apply its remedies to *McLaughlin* violations. Therefore, we hold that appellant is entitled to 1 extra day of pretrial confinement credit against his sentence. Since appellant has already served his confinement, we order the credit be converted to 1 day of total forfeitures. See R.C.M. 305(k).

### III. Speedy Trial

Appellant insists that the military judge should have dismissed the charges' against him with prejudice because the prosecution failed to bring him to trial within 90 days of the initiation of his pretrial confinement. Appellant's attack is broad in scope. He claims that neither the special court martial convening authority nor the Article 32 investigating officer was authorized to grant delays for speedy trial accounting: the special court-martial convening authority because the case was referred to a general court-martial; the investigating officer because no convening authority had authorized him to grant delays. Normally, we review the military judge's rulings on speedy trial for an abuse of discretion and reasonableness. *United States v. Longhofer*, 29 M.J. 22, 28 (C.M.A.1989). Of course, we may find the facts overselves, if we so desire. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1994).

[23] "The accused shall be brought to trial within 120 days after the earlier of (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or, (3) Entry on active duty under R.C.M. 204." R.C.M. 707(a); see *United States v. Kossman*, 38 M.J. 258 (C.M.A.1993) (overruling *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166, 1971 WL 12477 (1971) and *United States v. Driver*, 23 U.S.C.M.A. 243, 49 C.M.R. 376, 1974 WL 14085 (1974) presumption of speedy trial violation when pretrial confinement exceeds 90 days). "All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run." R.C.M. 707(c). Regardless of the 120-day rule, the prosecution must take immediate steps to bring a confined accused to trial. Article 10, UCMJ, 10 U.S.C. § 810 (1988); *Kossman*, 38 M.J. at 262



("reasonable diligence" suggested as appropriate standard to evaluate Article 10 mandate).

[24] Appellant was initially apprehended on 13 May 1992 by the Iowa police for violation of Iowa law. However, since the record is unclear as to whether appellant remained in custody in Iowa because of the civilian charges or to await escorts to return him to military control, we consider his pretrial confinement, for speedy trial purposes, to have begun on 13 May 1992. See *United States v. Keaton*, 18 U.S.C.M.A. 500, 40 C.M.R. 212, 1969 WL 6045 (1969) (date of confinement for speedy trial purposes is date incarcerated for military offense). Appellant was arraigned 154 days later—14 October 1992. At the defense request, the military judge granted a 34-day delay from 10 September to 14 October 1992. Thus, appellant was brought to trial on the 120th day under R.C.M. 707. We need not reach appellant's assertions that neither the special court-martial convening authority nor the investigating officer had the authority to grant delays in this case. We conclude the prosecution was timely under R.C.M. 707 and was pursued with reasonable diligence under Article 10, UCMJ.

#### IV. Conclusion

The findings and sentence are correct in law and fact, and except for the *McLaughlin* credit for which appellant will be compensated 1 day of pay and allowances, no error prejudicial to the substantial rights of appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON, Senior Judges SNYDER, RAICHLE,  
and HEIMBURG, and Judges GAMBOA and  
BECKER concur.

Judge PEARSON, joined by Judge SCHREIER,  
(concurring in part and dissenting in part):

Speaking for the majority in *United States v. Gipson*, Judge Cox summarized his view on the reliability of polygraph evidence:

In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion.

*United States v. Gipson*, 24 M.J. 246, 253 (C.M.A.1987).

If Judge Cox is right, and we think he is, this appellant was denied his constitutional right to lay the foundation for relevant, material, and favorable exculpatory evidence vital for his defense. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (accused's right to present evidence); *Gipson*, 24 M.J. at 254 app. (listing of articles and treatises on reliability of polygraphs); *McMorris v. Israel*, 643 F.2d 458, 461-462 (7th Cir.1981) ("[W]e note that even the most ardent detractors from the validity of polygraph evidence concede a degree of reliability of 70% or higher for properly administered examinations.") cert. denied, 455 U.S. 967, 102 S.Ct. 1479, 71 L.Ed.2d 684 (1982). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, — U.S. —, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (standard for admitting expert testimony under Fed.R.Evid. 702); *United*

*States v. Garcia*, 40 M.J. 533 (A.F.C.M.R.1994) (standard for admitting expert testimony under Mil.R.Evid. 702); *United States v. Combs*, 35 M.J. 820 (A.F.C.M.R.1992) (same), *aff'd*, 39 M.J. 288 (C.M.A.1994).

Litigated urinalysis cases often present the classic man versus machine contest. There are no eye witnesses to the urinalysis based drug charge, nor any witnesses who testify the accused was somehow impaired, nor any other corroborating evidence of drug use. Likewise, there is no evidence to show where or how the accused allegedly used the drug, or a precise time of use. Instead, machines—operated by humans—produce results—interpreted by humans—which the prosecution uses to procure a conviction. In this regard, the prosecutor calls an expert witness to explain that the machine results show the accused's urine specimen contained a metabolite of a chemical compound which is found in the drug charged. Consequently, the prosecution's case rests entirely on scientific evidence offered under Military Rule of Evidence 702.

Do urinalysis machines, or their operators, make "mistakes" which go undetected through normal quality control? We need only look at Pentium computer chips that can't divide, nuclear reactors that go haywire, and space shuttles that don't launch to answer that question.

So what if you are wrongfully accused of drug use based on an erroneous urinalysis result? You have no eyewitnesses to shake on cross-examination or to help you. You have no alibi witnesses unless you are in direct observation of someone for 24 hours a day, 7 days a week, since it only takes a moment alone to snort cocaine or consume most other drugs. Because of the nebulous nature of the prosecution's evidence, you basically have only your word. But, why should a judge or jury believe you, as opposed to the prosecution's "scientific" evidence, if you chose to testify? Credibility!

In a urinalysis case, the accused's credibility becomes the whole ball game if the accused denies use since urinalysis machines can't be cross-examined. If the court convicts, it chooses not to believe the accused, the only real witness to the offense. Thus, evidence reflecting favorably on the credibility of the accused's denial is relevant, material, and vital to the defense in a urinalysis case where the accused takes the stand, which brings us to polygraphs.

Polygraphs are also machines—operated by humans—which produce results—interpreted by humans. Polygraph evidence reflects on the credibility of an accused's denial of having used the drug charged. *Gipson*, 24 M.J. at 253; *McMorris*, 643 F.2d at 461-2. Is it admissible on an accused's behalf—we think so in spite of the absolute prohibition in Military Rule of Evidence 707. See *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994).

We agree the President may promulgate rules of evidence for trials by court-martial. However, the President may not promulgate a rule which infringes on an accused's constitutional right to present relevant, material, and favorable evidence. See, e.g., *Ellis v. Jacob*, 26 M.J. 90 (C.M.A.1988) (striking down President's rule in R.C.M. 916(k)(2) precluding accused from presenting evidence of partial mental responsibility to negate state of mind element of an offense); *United States v. Hollimon*, 16 M.J. 164 (C.M.A.1983) (recognizing constitutional limit on President's bar in Mil.R.Evid. 412(a) on admission of reputation or opinion evidence of nonconsensual sexual offense victim's past sexual behavior).

Consequently, we recognize a constitutional escape clause to Military Rule of Evidence 707, similar to that found expressly in Rule 412(b) which excludes evidence of a nonconsensual sexual offense victim's past sexual behavior. Polygraph evidence is not admissible unless it is



"constitutionally required to be admitted," that is, unless it is relevant, material, and favorable to the defense. *Cf. United States v. Williams*, 37 M.J. 352 (C.M.A.1993) (constitutionally required evidence under Mil.R.Evid. 412). In this regard, military judges should "view liberally the question of whether the expert's testimony may assist the trier of fact." *Combs*, 35 M.J. at 826. And, "[i]f anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's." *Gipson*, 24 M.J. at 252.

Here, the military judge did not afford appellant the opportunity to show his polygraph evidence met the constitutionally required criteria for admission. Consequently, we would return the record of trial to The Judge Advocate General for remand to the convening authority for a hearing on the admissibility of the proffered polygraph evidence in accordance with the procedures outlined in *United States v. Williams*, 39 M.J. at 559.

APR 21 1997

No. 96-1133

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**In the Supreme Court of the United States**

OCTOBER TERM, 1996

---

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

---

**REPLY BRIEF FOR THE UNITED STATES**

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WALTER DELLINGER  
*Acting Solicitor General  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, PETITIONER

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**REPLY BRIEF FOR THE UNITED STATES**

---

1. Respondent does not dispute that the principle embraced by the Court of Appeals for the Armed Forces in this case, if correct, would invalidate a rule of evidence that is the law in numerous States. As we have explained (Pet. 12-13), many States follow the "traditional rule \* \* \* that polygraph results are per se inadmissible when offered by either party, either as to substantive evidence or as related to the credibility of the witness." *State v. Miller*, 522 A.2d 249, 260 (Conn. 1987). Petitioner does not explain, nor is it apparent, why the rejection of that "traditional rule" on constitutional grounds is unworthy of this Court's review.



Respondent suggests (Br. in Opp. 13-14) that the decision below is consistent with the views of other federal courts of appeals, because “every Federal Circuit save two allows the admission of polygraph evidence.” *Id.* at 13. That contention is flawed for two reasons. First, the majority of the federal courts of appeals have long adhered to the traditional rule that excludes polygraph evidence in all circumstances. See Pet. 13. Some courts have reassessed whether that conclusion reflects a correct interpretation of Rule 702 of the Federal Rules of Evidence in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but even those courts have not suggested that the Constitution forbids a categorical rule that bars such evidence. Second, and more fundamentally, those circuits that have considered the constitutional validity of the traditional rule that excludes such evidence have disagreed with the conclusion reached by the court below. See Pet. 13-14. That disagreement among appellate courts in the federal system is strong additional reason for this Court’s review.

2. Respondent argues that review should be denied because the decision below is correct. See Br. in Opp. 7-13. As respondent reads this Court’s Fifth and Sixth Amendment cases, exclusionary rules of evidence may not be predicated on reasoning that does not hold true “in all cases, under all circumstances” (*id.* at 5), and accordingly the accused is always entitled to show that his particular case may not come within the rationale that justifies a general exclusionary rule. See Pet. 12-13. That broad view of the Constitution, however, has never been accepted by this Court. See, e.g., *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (the fact that evidentiary rules “operate[]

to prevent a criminal defendant from presenting relevant evidence \* \* \* does not necessarily render [them] unconstitutional” under the Sixth Amendment). Indeed, that broad view could effectively preclude application in criminal cases of many exclusionary rules of evidence the validity of which has never before been doubted. Compare *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 (1996) (plurality opinion) (categorical rules of evidence generally permissible); *id.* at 2029 (O’Connor, J., dissenting) (categorical exclusionary rules may be suspect if adopted “for the express purpose of improving the State’s likelihood of winning a conviction against a certain type of defendant”).

As we have explained (Pet. 15-16), the correct Sixth Amendment inquiry in this context is whether the categorical exclusion of polygraph evidence is arbitrary or disproportionate to the legitimate interests served by Rule 707. Contrary to respondent’s contention (Br. in Opp. 11), the exclusion of expert testimony that lacks general acceptance within the scientific community is not “arbitrary” merely because it is possible that such testimony may some day gain widespread support among scientists. To the contrary, until this Court decided *Daubert* in 1993, a “‘general acceptance’ test ha[d] been the dominant standard for determining the admissibility of novel scientific evidence at trial” and was “followed by a majority of courts.” *Daubert*, 509 U.S. at 585. While *Daubert* concluded that the Federal Rules of Evidence replaced that “general acceptance” test with a more liberal standard, neither *Daubert* nor any other decision of this Court has ever embraced respondent’s suggestion that the traditional common law rule in this area is forbidden by the Constitution.

3. Especially in the military context, respondent cannot sustain his burden of demonstrating that a rule categorically excluding polygraph evidence is disproportionate to the legitimate government interests in avoiding confusion and wasteful collateral litigation on matters of scientific validity, and in preserving to the factfinders their historical role of assessing credibility on the basis of traditional, easily understood criteria.

There is no merit to respondent's suggestion that this Court should "give great deference" (Br. in Opp. 17) to the court of appeals' view that its holding will not unreasonably burden the armed services, because of that court's "unique role \* \* \* in the military system." *Id.* at 16. The court of appeals did not rest its holding on any appraisal of factors that are unique to the military system, but instead based its holding on an interpretation of the Constitution. That interpretation does not merit this Court's deference. Indeed, the deference that is appropriate in this case is due to the judgment of the Congress that the President should prescribe rules of evidence for military trials, see 10 U.S.C. 836(a), and to the President's decision to invoke that statutory authority, and his own inherent authority as Commander in Chief under the Constitution, see Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.), to prohibit the introduction of polygraph evidence in court martial proceedings.\* A court of appeals' decision invalidating on

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\* Respondent suggests in passing (Br. in Opp. 14) that Rule 707 is not authorized by Article 36(a) of the Uniform Code of Military Justice, 10 U.S.C. 836(a), because a per se rule excluding polygraph evidence is not a "generally recognized" rule of evidence. The Court of Appeals for the Armed Forces refused to pass on that argument, because respondent did not

constitutional grounds the judgment of the political branches in this sensitive area plainly warrants this Court's attention.

\* \* \* \* \*

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER DELLINGER  
Acting Solicitor General

APRIL 1997

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brief or argue it. See Pet. App. 5a-6a. That argument accordingly is no longer open to respondent. See, e.g., *Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993) (per curiam) (noting that this Court ordinarily will not pass on a claim that was neither pressed nor passed on below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (same).



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Supreme Court, U.S.

FILED

JUL 3 1997

No. 96-1133

DEPT. OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

**JOINT APPENDIX**

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**PETITION FOR WRIT OF CERTIORARI FILED:**

**JANUARY 16, 1997**

**CERTIORARI GRANTED: MAY 19, 1997**

76 p/2

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DEPARTMENT OF THE AIR FORCE  
AIR FORCE LEGAL SERVICES AGENCY  
USAF JUDICIARY WESTERN CIRCUIT  
TRAVIS AIR FORCE BASE, CALIFORNIA 94535

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UNITED STATES

*v.*

AMN EDWARD G. SCHEFFER  
FR554-85-0300  
22 Transportation Squadron  
March AFB, California

---

**ACCUSED'S MOTION CONCERNING THE  
ADMISSION OF POLYGRAPH RESULTS**

---

ISSUE

Whether the application of Military Rule of Evidence 707 to prohibit the accused from introducing in his defense the results of an exculpatory polygraph examination would render this court-martial fundamentally unfair and deprive him of due process of law?

FACTS

1. On 7 April 1992, Airman Scheffer provided a urine sample at the request of Special Agent Rob Shilaikis, of Detachment 1803, Air Force Office of Special Investigations, March AFB, California.

2. On 10 April 1992, Special Agent J. Black, a polygrapher trained and certified by the Department of Defense, who was assigned to AFOSI, District 18, Norton AFB, California, administered a polygraph examination to Amn Scheffer.

3. SA Black asked Amn Scheffer several "relevant" questions, among them: "Since you've been in the Air Force, have you used any illegal drugs?" Amn Scheffer responded that he had not.

4. SA Black, as well as other qualified and experienced polygraphers, determined that Amn Scheffer's responses "indicated no deception." This means, in lay terms, that he "passed" the test—he was telling the truth.

5. In May 1992, the Air Force Drug Testing Laboratory, located at Brooks AFB, Texas, reported that Amn Scheffer's urine sample tested positive for the presence of methamphetamine metabolites. The results of this urinalysis form the sole basis for Charge II and its specification.

#### LAW AND ARGUMENT

The Court of Military Appeals, in *U.S. v. Gipson*, 24 M.J. 246 (CMA 1987), recognizes the argument that an accused has a constitutional right to present exculpatory evidence which is relevant and helpful. "When evidence meets these criteria, [that is, relevance and helpfulness,] no additional justification for admissibility is necessary. Mil. R. Evid. 401 and 402." *Gipson*, supra, at 252. The Court ruled that the military judge's refusal to allow the defense to attempt to lay a foundation for the admissibility of the results of an exculpatory polygraph examination was reversible

error. The Court suggests that military judges should, for due process purposes, "bend even further than normal in the direction of giving the accused the benefit of the doubt," when evaluating the admissibility of polygraph evidence under MRE 401 through 403.

This liberal approach to the admissibility of defense evidence is founded upon an accused's constitutional right to a fair trial and to due process of law. As the Supreme Court states in *Chambers v. Mississippi*, 41 United States Law Week 4266, 4269 (1973), "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right[] to . . . call witnesses in one's own behalf [has] long been recognized as essential to due process." The Court considers this right to call witnesses and present evidence—the accused's "right to his day in court"—to be one of "the most basic ingredients" and "fundamental element[s]" of due process. *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Admittedly, the government has an interest in formulating procedural rules that assure, insofar as possible, that only reliable evidence is presented to the trier of fact. A problem of constitutional dimensions may arise, however, when the state enacts a per se rule prohibiting the admission at trial of certain types of evidence. These per se rules are often violative of due process. See *Rock v. Arkansas*, 55 United States Law Week 4925 (1987) (hypnotically-refreshed testimony), *Chambers*, supra (hearsay), and *Washington*, supra (testimony of principal in same crime).



In fact, when evidence bears persuasive assurances of trustworthiness, and is critical to the defense, the best rule is that the per se procedural rule should be critically evaluated. For instance, the Supreme Court in *Chambers* remarked, "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, supra, at 4271.

Military Rule of Evidence 707 would operate to prohibit Amn Scheffer from seeking to introduce the results of the exculpatory polygraph. The Discussion to this per se procedural rule indicates that in the opinion of the Drafters of the Manual for Courts-Martial and, hence, in the opinion of the Executive, there is an "aura of near infallibility" about a polygraph test which creates "a danger of confusion of the issues," "can result in a substantial waste of time," and "places a burden on the administration of justice that outweighs the probative value of the evidence." The Drafters also maintain that the reliability of the polygraph machine has not yet been determined.

The problem, of course, is that the Drafters and the Executive have not analyzed this *particular* polygraph test. Their Rule prohibits the admission of the results of this *particular* polygraph test when it may very well be perfectly reliable and probative and not misleading. In any event, it certainly constitutes evidence that is material and necessary to Amn Scheffer's defense.

## CONCLUSION AND RELIEF REQUESTED

Military Rule of Evidence 707, a per se procedural rule enacted by executive fiat, violates Amn Scheffer's right to due process of law. You should declare it unconstitutional, and disregard it.

The defense should be allowed to lay a foundation for the admission of the polygraph test at issue. The military judge should evaluate the adequacy of the foundation from the standpoint of relevance and helpfulness and, "in these areas, judges should bend even further than normal in the direction of giving the accused the benefit of the doubt." *Gipson*, supra, at 252.

/s/ WILLIAM A. KURLANDER

WILLIAM A. KURLANDER, Capt, USAF  
Detailed Defense Counsel

/s/ RONALD J. WILLIAMS

RONALD J. WILLIAMS, Capt, USAF  
Individual Military Counsel

## SOURCE AND TARGET MANAGEMENT RECORD

MAKE LEGIBLE ENTRIES BY HAND OR  
TYPEWRITER

FILE NO. DETACHMENT NO. TITLE BLOCK  
Det 1803 (Complete for recruitment or changes)

PROGRAM NICKNAME (if applicable) SEVEN		EDWARD GLENN SCHEFFER Male Born: 16 Nov 70, CA AIC, FR 554-85-0300 22 Transportation Sq (SAC) March AFB, CA  AFSC: 47232 RACE: CAU
CHECK APPLICABLE BLOCKS		
XX OPEN OR REOPEN (TERMINATE ROUTINE REPORTS (ATTACHMENTS No (AFOSI FORM 38 Yes (AFOSI FORM 39		
TRANSFER TO: (PCS/DISCH ORDER		
TARGET(S) NARCOTICS		

INFORMATION (Received, levies, notes)

- HOME ADDRESS: Bldg 976, Rm 109, March AFB, CA
- DUTY PHONE: 655-5023
- CELL PHONE: 328-7638

- POV: Ford Ranger/green/brown trim
- license #: Unk
- HA: SA ROBERT H. SHILAIKIS
- AHA: SA DAVID P. RITER
- DCII RESULTS:

9. BACKGROUND: SOURCE was brought to Det 1803 by his 1st Sgt because SOURCE stated he had information concerning narcotics. SOURCE provided no information pertaining to narcotics and in our opinion used the excuse to talk to OSI in hopes it would get him out of trouble with his squadron. MSgt ROBINSON, SOURCE'S 1st Sgt, advised that SOURCE has been continually late for duty. On 10 Mar 92, SOURCE was again interviewed concerning narcotic information. SOURCE again provided no information advantageous to OSI. SOURCE did consent to the search of his person, residence and the seizure of his urine for the purpose of chemical analysis. AGENT NOTE: On 6 Apr 92 it was found that SOURCE's urine was secured in the evidence room, but not sent out to the laboratory. SOURCE did refuse consent to search his vehicle. It is still unclear as to why. No contraband or paraphernalia [illegible] found in any of the searches. SOURCE was told that if he came across any information relevant to contact HA. On 3 Apr 92, SOURCE contacted HA telephonically and provided the following information: SOURCE stated there was a "big deal going down". When questioned further it was determined SOURCE grew up with a white male named ROBERT DAVIS who [in] traffics methamphetamine. DAVIS buys his product from BILLY (NFI). BILLY receives his shipments from



Mexicans down south (NFI). SOURCE was instructed to tag along and provide intel to HA on 6 Apr 92. SOURCE was told to find out what the cost of 1/8 oz would be. SOURCE stated BILLY would only deal in oz's and above. SOURCE stated that it would cost \$650.00 per oz. On 6 Apr 92, SOURCE contacted HA telephonically. SOURCE was instructed to meet with HA and AHA at 1200 hrs same day. SOURCE was met and provided an abundance of information. SOURCE showed HA and AHA w[h]ere BILLY resides. AGENT NOTE: On 6 Apr 92, TOM SALSBERY, West End County Task Force, Riverside, CA, further identified BILLY as BILLY FINK who resides on Una street off of Markham. FINK is on felony probation for

[Right Margin]

ADMINISTRATIVE DATA *(Agent name, date, cost, pertinent file numbers)*

3-7 Apr 92

HA: SA SHILAIKIS

AHA: SA RITER

COST: \$18.21

SPECIAL HANDLING REQUIRED  
FOR OFFICIAL USE ONLY

methamphetamine sales. SOURCE was also asked if he has ever seen a lab which he replied yes. SOURCE was asked if he knew what chemicals were used to make meth which he replied, acetic acid, ephedrin and R-11 to gas the product. This information is consistent with methamphetamine labs. SOURCE consented to provide a urine specimen but could not produce. SOURCE agreed to provide a urine specimen on 7 Apr 92. On 7 Apr 92, SOURCE provided a consensual urine specimen. It was learned that SOURCE was late to work. SOURCE stated he went to DAVIS' apartment on 6 Apr 92 and left there at approx 1230 hrs. SOURCE stated the last thing he remembers is being on Alessandro Blvd. SOURCE stated he woke up on the 215 freeway at a rest stop with his doors to his truck open and his personal belongings thrown around. SOURCE stated nothing was missing. When asked, SOURCE stated he was fine, that he was coherent, and that he didn't need a doctor.

10. MOTIVATION: SOURCE'S motivation stems from two apparent avenues. Even though he has been told on numerous occasions that we (OSI) can not promise him anything, he feels we can help him PCS from March [AFB]. It is in the opinion of the HA that he also feels by playing both sides of the fence (OSI vs Transportation) he will be able to get out of some trouble.

11. LAC: No derogatory information found.

12. HANDLING PROBLEMS ANTICIPATED: Yes. SOURCE is an embellisher of the truth. He likes to have an audience. But he has thus far conducted all levies tasked expediently. He is very knowledgeable concerning methamphetamine.

SOURCE has stated over and over that he does not use or distribute. SOURCE has provided two consensual urinalysis and is scheduled for a polygraph examination on 10 Apr 92. Before using SOURCE to conduct controlled buys, SOURCE will be tested on a confidence buy. Through strict levies and a tight rein SOURCE could possibly produce major narcotics cases.

13. MEDICAL RECORDS REVIEW: A review of SOURCE's medical records was conducted on 6 Apr 92 by Col FOODY, 22d Medical Group for the purpose of polygraph examination. No information was found to preclude SOURCE from being examined.

14. CONTACTING INSTRUCTIONS: SOURCE is to contact HA by beeper and phone at least twice per week.

15. USM COMMENTS: HA is the USM. Concur.

16. DETCO COMMENTS: Concur with HA and USM. Treat with care. Always meet SOURCE with two agents.

17. BRIEFINGS PROVIDED: SOURCE was briefed on the following: AFR 205-57, Entrapment. SOURCE also read, understood and signed a declaration of agreement.

## SOURCE AND TARGET MANAGEMENT RECORD

MAKE LEGIBLE ENTRIES BY HAND OR  
TYPEWRITER

FILE NO. DETACHMENT NO. TITLE BLOCK

1803

(Complete for recruitment or changes)

PROGRAM NICKNAME (if applicable)  
SEVEN

CHECK APPLICABLE BLOCKS

OPEN OR REOPEN      TERMINATE

X ROUTINE REPORT      ATTACHMENTS  
AFOSI FORM 88

TRANSFER TO:      AFOSI FORM 39  
PCS/DISCH ORDER

TARGET(S)

INFORMATION (Received, levies, notes)

On 10 Apr 92, Source, after advisement of rights and signing a Statement of Consent to Polygraph related the following:

Source states he has been up front with OSI and hasn't lied about the drug information he's provided. He also stated he hasn't used any illegal drugs since entering the AF. He related he told his parents about his work with OSI. When discussing his past, Source stated he used meth quite a bit before coming into the AF and lied on his enlistment forms about his drug use.



The following relevant questions were asked:

a. Since you've been in the AF, Have you used any illegal drugs? no

b. Have you lied about any of the drug information you've given OSI? no

c. Besides your parents, have you told anyone you're assisting OSI? no

Analysis of the charts indicated no deception to the above questions.

The Statement of Consent and allied polygraph data are on file at Hq AFOSI.

[Right Margin]

ADMINISTRATIVE DATA (*Agent name, date, cost, pertinent file numbers*)

/s/ J. BLACK  
SA J. BLACK

10 Apr 92  
AFOSI Dist 18  
Norton AFB, CA

SPECIAL HANDLING REQUIRED  
FOR OFFICIAL USE ONLY

SOURCE AND TARGET MANAGEMENT RECORD		
MAKE LEGIBLE ENTRIES BY HAND OR TYPEWRITER		
FILE NO.	DETACHMENT NO.	TITLE BLOCK
	Det 1803	(Complete for recruitment or changes)
CHECK APPLICABLE BLOCKS		
<input type="checkbox"/> OPEN OR REOPEN <input type="checkbox"/> TERMINATE		
<input type="checkbox"/> ROUTINE REPORTS <input type="checkbox"/> ATTACHMENTS		
AFOSI FORM 38		
AFOSI FORM 39		
TRANSFER TO: <input type="checkbox"/> PCS/DISCH ORDER		
TARGET(S)		
NARCOTICS		

INFORMATION (*Received, levies, notes*)

INFORMATION: Results from AFDTL on SOURCE's consensual urinalysis results revealed SOURCE's urine positive for methamphetamine.

NOTE: This information confirms HA's suspicions of SOURCE being a pathological liar. SOURCE came up non-deceptive on his polygraph, but yet was using narcotics while providing info to AFOSI. SA Black, AFOSI Dist 18/Polygraph was notified concerning SOURCE's urinalysis results.

ADMINISTRATIVE DATA (*Agent name, date, cost, pertinent file  
numbers*)

14 May 92

HA: SA SHILAIKIS

COST: NA

SPECIAL HANDLING REQUIRED  
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DEPARTMENT OF THE AIR FORCE  
IN THE FIFTH JUDICIAL CIRCUIT

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UNITED STATES

*v.*

AMN EDWARD G. SCHEFFER  
FR554-85-0300  
22 Transportation Squadron  
March AFB, California

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UNITED STATES RESPONSE TO DEFENSE  
MOTION TO ADMIT POLYGRAPH RESULTS

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NATURE OF MOTION: In response to the Defense Motion to Admit results of the polygraph administered to the accused, the United States contends that polygraph results are inadmissible evidence under M. R. E. 707 and that the Defense Motion should therefore be denied.

SUMMARY OF FACTS: The United States does not adopt all of the facts from the accused's summary of facts, but we do adopt the following: On 7 April 1992, the accused provided a consensual urine sample to the OSI from Det. 1803, March AFB. The sample was sent to Brooks AFB laboratory, and tested positive for methamphetamine. On 10 April 1992, OSI SA Black from District 18, Norton OSI administered a polygraph test to the accused.



DISCUSSION: The United States contends that the state of the law regarding the admissibility of polygraph results is clearly stated in the Military Rules of Evidence 707, which states that "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." The rule was promulgated effective 6 July 1991, in the form of an amendment to the MCM.

The Defense motion relies on two main arguments: First, that *U.S. v. Gipson*, 24 M.J. 246 (CMA 1987) "recognizes the argument that the accused has a constitutional right to present exculpatory evidence which is relevant and helpful" (Id. at 252), and secondly, that per se rules regarding the inadmissibility of evidence, such as M.R.E. 707, may be violative of due process.

The Defense motion cites the *Gipson* court statement that the majority "recognizes" the constitutional argument that the accused has a right to present evidence, but in the paragraph that follows that citation, the court makes clear that they do not subscribe to that argument. The court states that "There can be no right to present evidence—however much it purports to exonerate an accused unless it is shown to be relevant and helpful" (Id. at 252). That is, the court believed that there is no independent constitutional right to present exculpatory evidence, unless it comports with the Federal Rules of Evidence for relevancy and helpfulness. The Defense also cited the court for the suggestion that for due process reasons, judges should bend to give the accused the benefit of

the doubt. In the actual context of the opinion, the *Gipson* majority opinion was that due process may be satisfied by working within the federal rules, not outside of them. The court noted, while disagreeing with the theory that the accused has an independent constitutional right to present *any* evidence, that due process "... has an impact in two respects. ..." The court then implies simply that judges should be more flexible when deciding whether the federal rules regarding relevancy and probative value have been satisfied by the accused. But certainly, the *Gipson* court at no point held that the federal rules do not apply, or subscribed to the notion that the accused has an independent constitutional right to present evidence, including favorable polygraph evidence, outside of the federal rules.

The *Gipson* opinion was more of a search for coherence in the federal rules, as opposed to a decision that created a new independent constitutional right outside of the Federal rules. The decision was made in 1987 in the context of the failure by the drafters of the Federal Rules of Evidence and the Military Rules of Evidence to provide any guidance on the *Frye* test of admissibility of polygraph results based upon acceptance in the scientific community. In *U.S. v. Howard*, 24 M.J. 897 (1987), the court opinion notes that the per se ban on the admissibility of polygraph results, set out in a long line of decisions since the 1923 *Frye* decision, was mirrored in the 1969 MCM in paragraph 142(e), but that the per se rule was not addressed in the 1984 MCM. Thus, the courts from 1984 until 1991, were left to interpret the federal rules that remained. Thus, with no guidance regarding their approach to the question of polygraph

admissibility, the court turned to the guidance laid out in MRE 401-403, and 702. The *Gipson* court, in searching for coherence in the rules, noted that the four federal rules on which it was relying "... seem to describe a comprehensive scheme. . . Such a scheme is within the President's authority to promulgate rules of evidence for courts-martial." (Id. at 251). *Gipson* and its progeny are all attempts to work within the federal rules and not attacks on the rules on due process grounds. In fact, in the final noteworthy decision on point prior to July 1991, *U.S. v. Rodriguez*, 34 M.J. 562 (1991), the majority states in footnote 1 that Rule 707 now governs all decisions regarding polygraph admissibility for cases in which arraignment occurred after 6 July 1991.

The defense motion cited the following three cases, also cited in the *Gipson* decision, for their due process argument: *Chambers v. Mississippi*, 41 U.S. Law Week 4266 (1973), *Washington v. Texas*, 388 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37, 55 U.S. Law Week 4925 (1987). None of the cases cited are directly on point specifically regarding polygraph evidence.

In *Chambers*, the per se exclusionary rule at issue forbade cross-examination of a witness, whereas in *Rock*, the rule at issue barred hypnotically refreshed testimony by the accused himself. The *Washington* case also addressed a per se rule that forbade testimony by persons charged as principals, accessories, or accomplices in the same crime as the accused from testifying in the trial. In all three cases, the courts focused on the constitutional right of an accused to testify and to face his accused. Each of the per se rules in the three cases involved the right of the

accused either to provide direct oral testimony or to cross-examine his accusers. The decisions in all three cases underscored the constitutional import of these constitutional rights, as indicated in the *Chambers* decision which notes that "The right to confront and cross examine witnesses and to call witnesses in one's behalf have long been recognized as essential to due process" (Id. at 4269). The *Washington* court also referred to the constitutional right of the accused to cross-examine witnesses, but it is noteworthy that even with a right as recognized as this, the court also stated that such a right still "is not absolute and may in appropriate cases bow to accommodate other legitimate interests. . . ." The *Rock* case is also cited for the theory that due process issues become a consideration when a rule "infringes impermissibly on the right of a defendant to testify on his or her own behalf" (Id. at 4930). But it is important to note that in one of the polygraph line of cases, *U.S. v. West*, 27 M.J. 223 (CMA 1988), the court cites *McMorris v. Israel*, 643 F.2d 458 (1981) in its response to *Rock*, by quoting the following: "Regardless of these principles, the right of an accused to present evidence in his defense must still yield to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence."

The *Chambers* court also states the right to confront one's accusers is not absolute, and referred to the traditional rationale for per se rules that exclude out-of-court statements by stating that "Out-of-court statements are traditionally excluded because they lack the indicia of reliability: they are usually not made under oath or other circumstances that impress



the speaker with the solemnity of his statements; the declarant's word is not subject to cross examination; and he is not available in order that his demeanor and credibility may be assessed by the jury (Id. at 4270)." This concern would be especially strong with polygraph results. The *Rock* decision itself notes that "numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify" (Id. at 4928), and then proceeds to cite *Chambers* and *Washington* for the same theory.

The Defense is also proceeding on the notion that the results of a polygraph test may be compared with the constitutional rights at issue in the three cases cited, that is, the rights to testify and cross examine one's accusers. The three cases cited by Defense all rely on the rights inherent in the Sixth Amendment, but those rights to testify and cross examine cannot be logically compared to the admission of the results of a polygraph test. The reliability inherent in oral testimony provided in the presence of the factfinder versus the faith one would have to place in the functioning of a polygraph test is overwhelming by comparison.

The Defense also seems to forget that admissibility of polygraph results was a "two way street" from 1987 to 1991, and therefore the drafters certainly had an opportunity to consider the due process arguments of the accused on presenting exculpatory evidence, and balance that with the threat that polygraph results could also be used against an accused. It is the unreliability of the polygraph, and the threatened perception of the machine as a "lie detector" on the part of juries that keeps the polygraph out of the

courts. The rationale of the drafters is just as likely to protect an accused from admission of damning evidence, than to affect his ability to present a defense.

The Defense also cites the Appendix to the 1991 amendments to MRE 707, in the argument that the per se rule prohibits the court from its ability to judge the reliability of each individual polygraph on a case by case basis. The best response to this particular argument is in the Appendix itself which states that a very real fear on the part of the drafters "[Was that admissibility of polygraph results] could result in the court-martial degenerating into a trial of the polygraph machine."

The rules of evidence are to be construed, as stated in MRE 102, to "secure fairness in administration . . . and the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Although Rule 102 should not be read by itself, if read in conjunction with the explicit rationale provided in MRE 707, the concerns expressed in both rules for avoiding needless delay and expense and enhancing factfinding further underscore the fact that the drafters considered the arguments and put MRE 707 in place to protect against unreliable evidence.

The Appendix to MRE 707 states that the per se rule is modeled on California Evidence Code 351.1, which creates a per se bar on polygraph evidence in all criminal and juvenile proceedings. Several other states, and cases from every Circuit have adopted per se rules against admission of polygraph evidence for the very same fears as those set out in the Appendix to 707, that is, the fear of unreliability, confusion, and

the threat to the "integrity of the judicial system" should such evidence be admitted.

CONCLUSION: MRE 707 prohibits the use of polygraph evidence in courts-martial. The rationale supporting the rule, found in case law and in the federal rules themselves, clearly states that such evidence is unreliable and poses a threat to the integrity of the court-martial. All of the case law, including those cases cited by the Defense, states that the right to present evidence is not absolute, but that evidence must satisfy those evidentiary and procedural rules that exist to protect the criminal process. We therefore respectfully request that the polygraph results of the accused be declared inadmissible in the court-martial in question.

Respectfully submitted,

/s/ EDWARD J. DAMICO  
EDWARD J. DAMICO, Lt., USAF  
Assistant Trial Counsel

DEPARTMENT OF THE AIR FORCE  
IN THE FIFTH JUDICIAL CIRCUIT

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UNITED STATES

v.

AMN EDWARD G. SCHEFFER  
FR554-85-0300  
22 Transportation Squadron  
March AFB, California

---

Military Judge's Ruling on Accused's  
Polygraph Motion (Record of Trial)

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\* \* \* \* \*

[42] MJ: \* \* \* Polygraph exam, defense counsel, do we need any evidence on that?

DC: As to the polygraph motion, Your Honor, we think that we don't need to call any live witnesses, and that the evidence that we have produced, those three Air Force OSI Form 14s attached to the motion, clearly show that a urine sample was obtained on the 7th of April 1992, that there was a so called exculpatory polygraph given to Airman Scheffer on the 10th of April 1992, and that apparently the urine sample came back positive. The results of the urinalysis, or the purported results of the urinalysis, don't jive with the results of the exculpatory polygraph. We think that the [43]



documents speak for themselves, and we don't need to provide any testimony on this, sir.

MJ: Is Airman Scheffer planning to testify regarding that specification on the merits?

DC: Your Honor, are you asking whether Airman Scheffer intends to testify in the case in chief?

MJ: Right.

DC: We are not prepared to disclose that, sir.

MJ: What about *U.S. versus Abeyta* which indicates that polygraph results would only be relevant if he did testify, and was asked the same question that he was asked on the polygraph.

DC: Your Honor, may I please ask you for the cite to *U.S. versus Abeyta*?

MJ: 25 MJ 97, Court of Military Appeals, 1987.

DC: May we take a three minute recess, Your Honor.

MJ: Certainly. I'm going to stay right here, but court will be in recess.

(The Article 39(a) Session recessed at 1055 hours, 14 October 1992, was called to order at 1105 hours, 14 October 1992, with all parties present when the court recessed again present.)

MJ: Court will come to order. Please be seated.

ATC II: All parties who were present when the court recessed are again present. The members are absent.

MJ: Captain Kurlander?

DC: Your Honor, we are interested in a preliminary ruling from you on this point, because that is going to make some difference as to whether or

not Airman Scheffer testifies as to the charge in question. Right now, though, we anticipate that Airman Scheffer will be testifying as to the charge in [44] question, because we have earlier—some time ago—put the government on notice that we are anticipating using an innocent ingestion defense in this case. Therefore, we are asking for this preliminary ruling from you now as to whether or not the defense would be entitled to attempt to lay the foundation for the admissibility of polygraph methods, because whether or not the accused testifies, is in a large measure going to be determined by your ruling on this point.

MJ: All right. With the understanding then that, if Airman Scheffer does not testify or does not testify as to the same things he said to the polygraph examiner, it wouldn't be relevant, and therefore there wouldn't be an issue. I will go ahead and rule on it. Do you want to go ahead and make your argument.

DC: Your Honor, may we have one moment, please?

MJ: Sure.

(Defense counsel conferred with individual military counsel.)

DC: Your Honor, I just want to make clear that right now we do intend to call Airman Scheffer as a witness, as to the drug charge. In terms of argument, I'd say, Your Honor, that the *Gipson* case is clear. We believe that the President's promulgation of Military Rule of Evidence 707 really is unconstitutional if it prohibits an accused from introducing relevant and helpful

exculpatory evidence. That's why we want to lay the foundation for the polygraph, to show that in this particular case, Your Honor, the polygraph results are relevant and helpful. We're not saying an accused has an independent and constitutional right to present polygraph evidence. We're only saying that, given the court's due process concerns, that the road should be a tad bit wider for the defense, and that we should be permitted to lay the foundation to show that the results of this particular test are relevant and helpful in this case. We think that *Gipson* therefore, is controlling, Your Honor, and that a constitutional right takes precedence, in this case, to Military Rule of Evidence 707. We think that we should be permitted to lay the foundation.

[45]

MJ: I want to make it clear, Captain Kurlander, if I didn't before, that I am going to give you a preliminary ruling on that, only with the understanding that if you decide your client is not going to testify then there isn't any issue. I'm going to wait and see if he does, and then I will rule.

DC: I understand that, Your Honor.

MJ: So, you need to understand that I recognize—I don't know what kind of evidence the government may have, but you may have some sort of a Hobson's choice here in that the relevant question is "Have you ever used drugs in the Air Force?" You may open the door to some uncharged misconduct if he wants to testify

about that. That is the choice you are going to have to make.

DC: I understand that, sir.

MJ: Okay. Trial counsel, argument?

TC: Your Honor, we will rest on our brief.

MJ: All right. For purposes of the motion the court will consider the following facts:

That the accused provided the urine sample on the 7th of April 1992, which later tested positive for methamphetamine.

On the 10th of April 1992, the accused was administered a polygraph exam by the OSI, and asked the question, "Since you have been in the Air Force, have you used any illegal drugs?" He responded negatively. The Polygrapher's opinion was that no deception was indicated in that answer.

In *Gipson*, the Court of Military Appeals indicated that there was no constitutional right to present evidence unless it was relevant and helpful, leaving open, arguably, the question of whether the President can determine for all cases that it's never relevant and helpful; at least that it's never helpful or just determine that it was never relevant, or whether there is some constitutional right to present that [46] evidence. The case law that I have reviewed, finding a constitutional right to present polygraph evidence is not particularly persuasive. It tends to be from some of the trial courts.

As I indicated earlier, the evidence is relevant only if the accused testifies consistently with his answer—



he testifies and answers the same question that he did on the polygraph.

For evidence to be helpful, the testimony of the polygrapher would have to be an area in which the fact finder himself needs help in making a decision. It would have to be the result of a process with sufficient scientific acceptability to be relevant. The *Frye* test is not the test anymore; that sort of analysis is helpful in deciding whether at least there is sufficient scientific acceptance of the process that the evidence is relevant.

Lastly, the equipment, the operator, the questions and the circumstances have to be sufficiently reliable to be helpful to the trier of fact. It seems to me that only the third of those three issues is case specific. Therefore, the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant.

The other concern about polygraph testimony is Military Rule of Evidence 403. The fact finder might give it too much weight, and that there is an inordinate amount of time and expense, especially in the cases where there may be conflicting tests, which doesn't appear to be the case here.

The main confusion of the issue; that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs.

Given those concerns, I don't believe that the constitution prohibits the President from appropriately

ruling that polygraph evidence will not be admitted in a court-martial.

So, your request to lay a foundation for the admission of polygraph evidence in this case is denied.

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DEPARTMENT OF THE AIR FORCE  
IN THE FIFTH JUDICIAL CIRCUIT

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UNITED STATES

*v.*

AMN EDWARD G. SCHEFFER  
FR554-85-0300  
22 Transportation Squadron  
March AFB, California

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EDWARD G. SCHEFFER'S TESTIMONY

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\* \* \* \* \*

[288] IMC: Your Honor, at this time we would call  
Airman Scheffer.

EDWARD G. SCHEFFER

was called as a witness in his own behalf, was  
sworn and testified as follows:

Questions by trial counsel.

- Q. State your name, rank and your organization.
- A. My name is—Airman Edward G. Scheffer. I  
work for the 22d Transportation Squadron. I am  
21 years of age.
- Q. You are the accused in this case, correct?

A. Yes, sir.

DIRECT EXAMINATION

Questions by individual military counsel.

- Q. Airman Scheffer, during the month of March and  
April, did you work for the OSI?
- A. Yes, sir, I did.
- Q. When did you start working for the OSI?
- A. Approximately 5 March, sir.
- Q. What did the OSI want you to do for them?
- A. They wanted me to build a relationship, a  
trusting relationship, with various drug dealers.
- Q. Why did they want you to build these  
relationships?
- A. So they could operate sting operations on them.
- Q. And did you do that for the OSI?
- A. Yes, sir, I did.
- [289] Q. How did you build these relationships?
- A. By going to these people, mostly people that I  
knew, speaking with them, just trying to build a  
relationship that had been lost over the years —  
as being friends, helping them work on their  
cars, on their stereos, watching movies and stuff  
like that.



Q. Did the OSI in particular, ask you to build this kind of a relationship with Robert Davis?

A. Yes, sir, they did.

Q. What did you do with Robert Davis to build this relationship?

A. Robert Davis and I had been friends in the past. So, I knew pretty much what he liked to do. We worked on his car a lot, built stereos for cars and talked a lot. Built back a friendly relationship.

Q. How much time did you spend with Robert Davis from the time that you started working for the OSI, around the 5th of March, until, let's say, the 7th of April or so?

A. A lot, sir.

Q. Roughly, an estimate. How many times a week would you see him?

A. Five times a week, sir; six times.

Q. What would you do?

A. We would—as I said before, we would work on his car, or his stereo, eat dinner, eat lunch, possibly breakfast, depending on when I was there, sat around and talked, and stuff like that, sir.

Q. Now, when you were at Robert Davis' house, were there ever any drugs there?

A. All the time, sir.

[290] Q. Did he ever do anything with the drugs?

A. Yes, sir. He sold them. He weighed them. He used them himself.

Q. Did the OSI ever have you buy any drugs from Robert Davis?

A. Yes, sir, they did.

Q. Let's focus on the time when you starting developing this relationship with Robert Davis, and about the 7th of April, I imagine that you spent time with him—helped him with his stereo, his car and you ate with him—what kind of stuff would you guys eat together?

A. Sir, on an average we were all pretty much addicts to Taco Bell and Del Taco. So, we would eat at least two meals a day there. We would eat tacos, burritos; we would get these big 48 ounce cokes—that was a normal meal.

Q. And who would buy the stuff?

A. Myself, Robert Davis or somebody else that was around—his girlfriend or one of other friends would go pick something up.

Q. What would you do with it? Would you eat it there?

A. They would bring it back to us. Whoever would normally go and get it, would pay for it and—it wouldn't be like taking up a collection or anything like that—they would bring it back, and then we would all sit around and eat.

Q. At anytime when the food had been brought back, were there any drugs lying out around Robert Davis' house when you had food out?

A. Many occasions, yes, sir.

Q. Were there—were you always—did you always sit down and finish everything you had on your plate at one sitting, or did you ever get up?

A. No, sir. There was many times where I went to the bathroom, [291] or I wasn't really in a hurry to eat, or I wasn't that hungry, or we needed something, or we wanted to do something else—I would go and set that up, or go pick something up. I would leave my coke there and some of my food there. There were a lot of times where there was still stuff sitting around.

Q. Now, you mentioned that Robert Davis had a lot of drugs around; did you ever see him transport these drugs anywhere?

A. Yes, sir, I did. There were a few times when—mentioned Mr. Fink—we had went out to his house. When we were coming back, he had like a hide-a-can; it was like a haveling can with a screw off top. A lot of times that is where he would put his drugs, and he would transport them in and out like that.

Q. Now, at anytime between the time you started working for the OSI and the 7th of April when you took the urinalysis for the OSI, did you ever knowingly ingest methamphetamine?

A. No, sir, I did not.

IMC: Thank you. No further questions.

MJ: Captain Murphy?

TC: Your Honor, was the question, up until 7 April 1992?

IMC: Up until the time that he took the urinalysis—

TC: I think you said 7 April. That is what I am confused about.

IMC: I believe 7 April 1992, was the date, Your Honor.

TC: Your Honor, we would like a 39(a).

MJ: Members, would you excuse us for a few minutes please.

(The Members withdrew from the courtroom.)

(The court recessed at 1415 hours, 16 October 1992.)

\* \* \* \* \*

[304] MJ: Captain Murphy, cross examination?

TC: Thank you, Your Honor.

### CROSS EXAMINATION

Questions by trial counsel.

Q. Airman, you approached the OSI about the information regarding Robert Davis, isn't that correct?



- A. Yes, sir.
- Q. And you also approached the OSI about information regarding Fink, isn't that correct?
- A. Yes, sir.
- Q. Prior to that, they didn't know anything. You are the one that provided them with that information what these guys were doing, correct?
- A. Yes, sir.
- Q. Now, are you aware of what the effects of methamphetamine are in a human body?
- A. Yes, sir.
- Q. What are those effects?
- A. Dilation of pupils, anxiety, loss of hunger, insomnia, and extreme agitation.
- Q. Have you ever used methamphetamine prior to entering the [305] service?
- A. Yes, sir.
- Q. So, you are aware of those effects personally in your body?
- A. Yes, sir.
- Q. Did any of those effects on your body include blackouts?
- A. Not that I can recall, sir.

- Q. Now, let's go to the evening of April 7th—first the day before, April 6th, 1992. Special Agent Shilaikis asked you to provide a urine sample, that is correct, isn't it?
- A. No, sir.
- Q. That's what he testified to, isn't it?
- A. I believe that's what he has testified to, sir.
- Q. What's the truth on that? What's your version of that?
- A. Sir, my recollection is that Agent Shilaikis asked me, as he dropped me off here in Moreno Valley, if I needed to go to the bathroom. I stated, "No." Then he said, "Okay, why don't you just go ahead and come in first thing in the morning or give me a call before you come in first thing in the morning." I said, "All right." That was the end of the conversation. I called him the next morning around 7:30, reported around 8:00 o'clock and gave the urine specimen.
- Q. So, when Special Agent Shilaikis asked you to provide a urine sample and you said, "I only urinate once a day", he was mistaken or lying about that?
- A. He was mistaken; I do only go very few times—twice a day was my answer to that, sir.
- Q. So, his testimony was mistaken?
- A. Yes, sir.

[306] Q. Nevertheless, you were aware, prior to 7 April 1992, that you would be providing a urinalysis sample, is that correct?

A. Yes, sir, it is.

Q. It was your idea to visit Robert Davis that evening, isn't that correct?

A. On the 6th, sir?

Q. On the evening of the 6th.

A. I cannot recall if I was told to talk to him or on my own, sir.

Q. Special Agent Shilaikis testified that you told him that you would like to go up to Davis' place that evening. Do you recall that testimony?

A. Yes, sir, I do.

Q. Are you saying that, once again, Special Agent Shilaikis is mistaken or inaccurate in his recollection?

A. No, sir, I'm not.

Q. You just don't recall?

A. I don't recall.

Q. So, it certainly is possible that it was your idea to go to Robert Davis' home that evening?

A. Yes, sir.

Q. Did you, in fact, go to his house?

A. Yes, sir.

Q. What time did you arrive at his home?

A. 6 or 7 in the evening, sir.

Q. How many individuals were at his home?

[307] A. I would say four or five, sir.

Q. Was there methamphetamine present in his home that you observed?

A. Yes, sir.

Q. What did you have to consume at his home?

A. Sir, we normally eat, as I stated before, from Del Taco or someplace like that. That is what we consumed that evening. We had went to Del Taco and brought home burritos, tacos and cokes, sir.

Q. Did you eat at his home, or did you eat at Del Taco?

A. No, we ate at his home, sir. That was almost always where we ate.

Q. Did you eat anything else?

A. Not to my recollection.

Q. You normally ate Del Taco food?

A. Sir?

Q. You normally ate Del Taco food?



A. That night, sir?

Q. Yes.

A. Yes, if my recollection served me right, yes, sir.

Q. Do you recall making a statement to the OSI on the 7th of April?

A. A statement?

Q. Yes. A typewritten statement.

A. Yes, sir.

[308] Q. Would it surprise you that you stated in that statement you ate some pizza from Little Caesars and drank two cokes?

A. That's possible, sir. Like I said, that was the best of my recollection.

Q. Well, pizza is a little different than eating Del Taco food?

A. That's what I said, on the average we ate Del Taco food.

Q. Are you satisfied with probably pizza?

A. If that's what I wrote down, yes, sir.

Q. Do you recall how much pizza you ate?

A. No, sir.

Q. When you ate the pizza, did the pizza taste different or anything of that nature?

A. No, sir.

Q. When you drank the cokes, do you recall tasting anything different in the coke?

A. No, sir.

Q. Was it regular coke or diet coke?

A. Regular coke, sir.

Q. How about the second coke, anything unusual?

A. I don't know. I always drink regular coke.

Q. Did you taste anything in the coke?

A. Not to my recollection.

Q. When you were done eating, that statement then indicates that you went to Del Taco alone and bought another coke. Do you recall that?

[309] A. No sir. But, I probably did.

Q. Do you think if you looked at the statement, that may refresh your recollection?

A. It could, sir.

TC: Your Honor, I will mark that as Prosecution Exhibit 10 for identification.

(Trial counsel handed Prosecution Exhibit 10 for identification to the accused to review.)

(Questions continuing by trial counsel.)

Q. Take a look at that, and see if that will refresh your recollection about what you ate and drank that evening. Does that refresh your recollection about what you ate and drank that evening?

A. Yes, sir, somewhat.

Q. You don't have any reason to believe that Del Taco puts methamphetamine in their cokes, do you?

A. No, sir, I do not.

Q. Now, after you left Del Taco, I guess you were on your way home, is that right?

A. Yes, sir. On my way back here to the base.

Q. What happened then?

A. Sir, I came up to Allessandro—I worked my way from Corona back here to Moreno Valley. I got up here to the stop light at Allessandro, and that is honestly the last thing that I can remember until I figured out that I was somewhere in Barstow. I have no idea how I got there. To this day, it still worries me. It scares me.

Q. Prior to that time, did you feel any sudden rush of energy?

[310] A. No, sir, I did not.

Q. Did you feel any anxiety or anything?

A. No, sir.

Q. After you woke up, did you feel any energy or rush?

A. No, sir. I was, of course, highly nervous about where I was and why I was there, and how I got there. That was my being paranoid.

Q. So, you were paranoid about what happened to you?

A. I was scared, sir, more than paranoid.

Q. So, when Special Agent Shilaikis described you as being nervous and anxious, that was a result of the fact that you didn't know where you were?

A. Yes, sir.

Q. Nothing to do with the fact that you had taken methamphetamine?

A. Sir, I didn't take methamphetamine to my knowledge.

Q. So, it had nothing to do with that, right?

A. Yes, sir.

Q. Let's go back to the time before that. Prior to the evening of the 6th of April, when you went to Billy Fink's home. When was the next time prior to that?

A. The time prior to what, sir?

Q. The 6th of April; the 6th of April is when you were asked to provide the consensual



urinalysis, or Special Agent Shilaikis testified he asked you to provide a consensual urinalysis. Then that evening, you went to the Davis' home?

A. Yes, sir.

[311]

Q. Prior to that, when was the first time or the last time you were to Davis' home prior to that?

A. The last time?

Q. Yes.

A. I believe, the night before, sir. I'm sorry, that evening.

Q. So, you had gone there on the night of the 5th?

A. Yes, sir.

Q. Did you eat anything the night of the 5th?

A. As I stated once before, sir, every time I went over there, I always ate. Because there was normally a meal I was going to miss if I didn't eat something. So, yes.

Q. Do you recall tasting anything unusual in anything that you ate?

A. No, sir.

Q. Do you recall experiencing any sudden burst of energy or sudden rush?

A. No, sir.

Q. Do you recall drinking anything that tasted bitter?

A. No, sir.

Q. How about before that, when was the next time you visited Fink's home?

A. Sir, again as I stated once before, I was there almost every night. That was Davis', sir. So, like I said, I was there almost every night or evening. As soon as I got off work, or anytime that Agent Shilaikis had me come from the Transportation Squadron to his office, and then he would send me out, whether it was 8:00 o'clock in the morning, or 1:00 o'clock in the afternoon, or 10:00 o'clock at night. It was [312] almost always one meal a day, sometimes two.

Q. So, to the best of your recollection, for at least a week prior, you spent everyday at Davis' home?

A. I can't recall if it was everyday, sir. I can't recall that.

Q. During any of those meals, did you feel any sudden rush of energy?

A. No, sir.

Q. Did you feel any burst of energy?

A. Again, not to my recollection, sir.

Q. Taste anything unusual in the food?

A. Again, no, sir.

Q. Now, you told Special Agent Shilaikis that both Davis and Fink were big time drug dealers, right?

A. Yes, I did.

Q. In fact, you told him that Fink dealt in pounds of methamphetamine?

A. Yes, sir, I did.

Q. And they didn't find anything in Fink's home, did they?

A. I was told, no, sir.

Q. They didn't find anything in Davis' home either?

A. From what I was told, no, sir.

TC: I have no further questions.

MJ: Captain Williams?

IMC: No redirect, Your Honor.

[313]

MJ: Questions from members of the court?

(Affirmative response from Lieutenant Piech.)

PRES:

(Lieutenant Colonel Fullenkamp) Is it possible that the initial question that I had submitted to the Special Agent could be asked, unless you would like me to rewrite it?

MJ: I think we can find it. It's Appellate Exhibit XV. The question, so that counsel can be thinking about it, was "What initiated his participation with the OSI?"

(The bailiff handed Appellate Exhibit XV and the question from Lieutenant Piech to counsel for both sides, and then to the military judge.)

MJ: Basically, that is the same question and I need to talk to counsel about that. I will hold those until we have another Article 39(a) Session, so that we don't take you out right now.

Airman Scheffer, you can return to your seat.

DC: Your Honor, I'm just curious, did you mark Lieutenant Piech's question as an Appellate Exhibit?

MJ: I think I need to do that. It's Appellate Exhibit XIX. Defense counsel, you can call your next witness.

IMC: Your Honor, we would call Mrs. Scheffer to the stand.

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DEPARTMENT OF THE AIR FORCE  
IN THE FIFTH JUDICIAL CIRCUIT

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UNITED STATES

*v.*

AMN EDWARD G. SCHEFFER  
FR554-85-0300  
22 Transportation Squadron  
March AFB, California

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[Renewed Defense Motion Concerning  
Polygraph Evidence — Record of Trial]

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[316]

ARTICLE 39(a) SESSION

(The Article 39(a) Session was called to order at 1525 hours, 16 October 1992, with all parties present when the court recessed again present, except the members.)

MJ: This Article 39(a) Session will come to order. Please be seated.

ATC II: All parties to the trial who were present when the court recessed are again present. The members are absent.

DC: Thank you, Your Honor. At this point, it's my recollection that you gave us just a

preliminary ruling on our motion concerning the admissibility of polygraph results earlier before trial. That's my recollection, sir. At this point we would renew that motion since the accused has testified.

MJ: Maybe I phrased it that way; I'm not sure I intended to. But, at any rate, the motion is denied.

DC: Yes, sir.

\* \* \* \* \*

DEPARTMENT OF THE AIR FORCE  
IN THE FIFTH JUDICIAL CIRCUIT

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UNITED STATES

*v.*

AMN EDWARD G. SCHEFFER  
FR554-85-0300  
22 Transportation Squadron  
March AFB, California

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[Closing Arguments]

Record of Trial

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\* \* \* \* \*

[339]

MJ: Captain Russell.

ATC I: Thank you, Your Honor.

Lieutenant Colonel Fullenkamp and members of the court, several days ago we told you that the accused was guilty in each and everyone of the offenses of which he has been charged. When we laid out the evidence, we said that we were going to present evidence to you to show beyond a reasonable doubt that the accused in this case committed all four of the offenses of which he has been charged. We've done that. What I want to do now is review the evidence that you've heard, the testimony you've heard and the

documentary evidence that you have received in order to facilitate your decision making in this process. [340] Again, let's start with Charge II, the wrongful use of methamphetamine. You heard evidence and testimony from four individuals regarding this meth use.

First, you heard testimony from Special Agent Shilaikis. Special Agent Shilaikis testified that on the 6th of April, 1992, he asked the accused to consent to a urinalysis. The accused said that he would do it, but that he was unable to urinate on that particular day—he only urinated once a day. So, Special Agent Shilaikis said we will do it the next day. Special Agent Shilaikis then testified that the accused said, "Why don't I go over to Robert Davis' house tonight?" Remember Robert Davis? This drug dealer. This individual that he is so terrified of. Well, on the 6th when he is submitting to a urinalysis, he says, "Why don't I go over to Robert Davis' house?" So, this is supposedly what happened. The next day, Special Agent Shilaikis told you, when he testified on the stand, that the accused called him and said, "I need to talk to you." He comes over. He comes over and he is animated, and says, "Where was I? Where was I?" Special Agent Shilaikis doesn't know what he is talking about. So, the accused goes into his story about going over to Robert Davis' house on the evening of the 6th, of having some pizza and cokes. Then he is driving home, returning to March Air Force Base. So, the next thing he realizes, he is on the side of the road. The car doors are open. He is lying there. He wakes up and he doesn't know how he got there. He has no idea how he got there. This is the story he gave to Special Agent Shilaikis. Again,

knowing that he would be submitting to a urine sample that day. Special Agent Shilaikis told you that he informed the accused that, again, he would like to have him consent to a urinalysis, which the accused did. Special Agent Shilaikis told you the procedures he used in obtaining that urinalysis.

First, you have the documentary evidence that he did consent to a urinalysis. You will have the urine bottle that had the accused's urine in it.

Special Agent Shilaikis, after signing the consent form, had Special Agent West—the second individual that you heard testify—act as an observer during the urinalysis. You heard Special Agent West say that he went with the accused, [341] with the bottle, to the restroom, and watched the accused directly urinate into the urine bottle. He sealed the lid on it, brought it back, handed it to Special Agent Shilaikis who then sealed it with a tamper resistant tape. Special Agent West put his initials on it. Special Agent Shilaikis put his initials on it. And the accused initialed the bottle.

At that point, Special Agent Shilaikis placed the bottle in a safe of which he and the DETCO commander were the only ones with the combination. The next day, he removed that bottle from the safe, with the tape still intact—no tampering with the bottle—and gave it to the third OSI agent you heard testify, Special Agent Evans.

Special Agent Evans then testified to the procedures that he followed. That he annotated it in the evidence log. You have that documentary evidence in front of you. That he kept it in the evidence room, where he and one other agent, Special Agent Riter,

had access to that room—nobody else had access to that room. Special Agent Evans stated that he packaged up the urine bottle on the 10th of April 1992. He prepared it for shipping, but he knew it was too late to ship it on that day. So, he returned it to the evidence room. Then on the 13th of April 1992, he took the evidence out of the evidence room, and shipped it off to Brooks Air Force Base; the lab. He stated that it was intact when he did it. The seals before he had packaged it, the seals were stills intact. There was no tampering with this bottle.

Chain of custody, here at March Air Force Base, was very secure. Each individual who handled that bottle testified. Each individual testified concerning the procedure, the process that was used, and the measures that were used to ensure that there was no tampering with that bottle.

Next, you heard from Doctor Naresh Jain. Doctor Jain testified concerning the chain of custody. He testified concerning the procedures at Brooks Air Force Base. He testified concerning checking the package that arrived. If it's damaged or broken they are going to be discarded. Of opening up the outer package, looking inside and checking each bottle, making sure that that seal is intact. If that seal is not intact, again, it is discarded. Doctor Jain, during [342] his lengthy testimony, on numerous occasions, said this chain of custody is tight. This chain of custody is secure.

Now, Doctor Jain testified at length concerning the process. There was a reason for that lengthy testimony. That was, that although the process is not



infallible, it's as close as you can get to being infallible. You heard that.

You heard the procedure of when the package arrives. It goes into a secure room. When the urine sample is going to be tested, a portion is poured out of the bottle and that sample is tested. If that sample is tested in the RIA, or radioimmunoassay, he testified here on the stand that a second confirmatory RIA is done. He said that's unnecessary forensic toxicology, but the Brooks Lab does that. So, there was a second RIA test done. Again, the accused's urine tested positive for methamphetamine. On both of those tests, Doctor Jain testified looking through the documentary evidence, Prosecution Exhibit 4, that the chain of custody was strict. Tight. Secure. No problem. So, after the first two RIA tests, he, again, testified at length concerning the third test; the GC/MS test. He testified at length to the procedures of that test. Again, chain of custody, as you recall, tight. No problem. Again, on the third test, each one being a different sample from that bottle, the accused's urine tested positive for methamphetamine.

Members of the court, there is no doubt that the urine that the accused submitted tested positive for methamphetamine. There is no doubt that that sample came from his body. Chain of custody is secure.

Now, the judge gave you an instruction, and I just want to read you part of it. It says, "If you find from the evidence beyond a reasonable doubt that the accused, did, in fact, ingest methamphetamine, you may infer that the accused's use was knowing and conscious." Then he stated, "That inference is not required on your part, but you may do so."

Members of the court, there is no doubt; in fact, we have proved beyond a reasonable doubt that the accused did, in fact, ingest methamphetamine. You may infer from that that it was knowing and conscious. [343] But, let's look again at what the accused stated. Let's look back on the 6th of April again. Let's look at his credibility and the probability of what he said occurred occurring. Again, the 6th of April. Special Agent Shilaikis asked for consent. Now, on the stand the accused said that he did not consent to the urinalysis on the 6th. Well, he is changing his testimony. Special Agent Shilaikis has no reason to get up here and lie. He told you that on the 6th he asked the accused to submit to a urinalysis the next day. He knew he was going to be tested. He has to come up with a story.

Again, we have the story of going to Robert Davis' home. The same Robert Davis that the accused, on the stand, said "I went there constantly and there was meth on the table." He told you that he ate food there, and he had some drinks. Well, why would Robert Davis or anybody that was there sprinkle methamphetamine into his food or in his drink? Special Agent Shilaikis testified concerning a controlled buy. A sixteenth of an ounce of meth costs \$80.00. Why would an individual take meth and throw it away? Why would he pull out his wallet, in essence throw away \$80.00, then not tell the accused. I mean, typically, if you are going to use meth, it's to get a kick out of it. If you are going to use it with your friends, you're going to do it together and have a good time. But, somehow some meth—throwing money away—was thrown into his food or into his drink. He never tells it. Robert Davis, on the 6th of April,—this is almost three

weeks before he is busted — he doesn't know whether the accused is involved in trying to get him. He has no motive for trying to set up the accused. He doesn't know the accused is going to go in and submit a urine sample the next day. Is he clairvoyant? He knows that, "On the 24th of April they are going to come bust me. So, I'm going to get the accused now." No. It makes no sense. He thinks you are gullible to buy that story.

The accused also testified that he felt no effects. That the day before, on the 6th, he didn't feel anything. On the 5th he didn't feel anything. He didn't feel a rush—a surge. The day before that, and the day before that. But, Doctor Jain, when he was on the stand during his testimony, told you with the reading on those tests, he would have [344] felt something. If he ingested methamphetamine, he would have felt something.

What has he told us? Robert Davis is a drug dealer. On the 24th when they go in to search Robert Davis' home, do they find the drugs, the guns and the other things that Special Agent Shilaikis testified that the accused had told him? No. They didn't find anything. Not a thing. Billy Fink. Pounds of drugs. Pounds. We're talking about a big time dealer. Weapons. When they search his home, did they find anything? Nothing. The only evidence that we have of those two being big time drug dealers is what the accused has told the OSI, and what he has told you. There is no independent evidence of that. Don't buy his story. There is one person in here who has reason to distort the truth. It's not Special Agent Shilaikis or any of the other OSI agents, or Doctor Jain. He is sitting at that table. He has reason to distort the truth.

What else did he tell us concerning his credibility? We will discuss this further, but I want to discuss it briefly now.

Trooper Steffen, when he was on the stand, what did he testify to? That when he pulled the accused over, the accused told him he was on leave. I'm going to Indiana, turning around, and heading back to California. After Trooper Steffen informed him that, in fact, he knew his status and that he had talked to the base, the accused then says, "I guess you know I'm AWOL." Again, another reason to lie. He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II.

Now, let's look at Charge I, that was the second offense that we discussed. Ms. Ruth Watson came in here, and testified that on the 27th of March 1992, the accused went into the Security Pacific Bank, on Sunnymead Boulevard, and opened up an account. He deposited \$277.00 in that account. She testified that going through the bank statement, which you have in front of you, that he immediately withdrew money. Then on the 30th of March, an empty deposit envelope was placed in there stating that \$250.00 was being deposit-[345]ed. Empty envelope. Then more money is taken out. Then on the 31st of March, the accused calls the bank and talks to Ruth Watson. He said, "I lost my ATM card. I lost my temporary checks." Remember the temporary checks that she discussed, numbers 75 through 100? "I've lost my temporary checks and my ATM card." She says, "You've got to close this account. This account has to be closed." Is she doing it to be vicious with the accused? No. She



is doing it to protect him. He is saying that he lost his ATM card and his checks. She is going to protect this guy and help him out—a young airman. What happens the very next day? Look at the charge sheet. Look at Charge I. Two checks appear the 1st of April, the day after this phone call when he has lost all of his temporary checks. Look at the numbers of those. Temporary checks; two of them. Then on the 2nd of April, another temporary check. On the 3rd, another. He is a liar. He wrote a total of 17 checks. Ruth Watson testified on this stand that after the initial day on the 27th of March, he never made another deposit. Now, she testified concerning that his account was restricted, but she also testified that if he had come in to make a deposit, they would have taken it. He didn't go in and make a deposit. \$277.00 is all that was ever put into that account. He wrote 17 checks for over \$3,000.00. Look at the account. He knew at the time that he wrote those checks there was no money in that account. He had the intent to defraud. This wasn't just a failure to maintain funds after he had written a check. He knew at the time that he was committing a crime. Ms. Watson, also testified that he doesn't have an account with a different branch of Security Pacific. There are no other accounts listed with Security Pacific. One account, this one here. The account was officially closed on the 16th of April 1992.

Now, Tech Sergeant Pangilinan came in here and testified that he didn't have sure pay going into this account either. There was no money going into it, aside from \$277.00, initially, that was withdrawn.

He is guilty of Charge I. He wrote those 17 checks with the intent to commit fraud. Look at his credibil-

ity. Look at his story, at what he told Ruth Watson. She doesn't have any reason to come in here and lie about this individual. Again, one person had a reason to lie. Over there.

[346] Now, let's look at Charge III, specification 1. That is a failure to go. Mr. Gutierrez came in here, and said that on the 23rd of April 1992, the accused failed to show at 7:00 o'clock in the morning, his duty hours; that he waited. Then he called the First Sergeant, Master Sergeant Robinson. Master Sergeant Robinson went over to the accused's dorm room, opened the door and found him in there asleep. He woke him up. The accused told him, along with other things, "Ah, I'm supposed to be at work." Well, what did Master Sergeant Robinson tell you? That the previous day, 24 hours before, on the 22nd, he told the accused, "You be at work tomorrow morning at 0700 hours, over at Building 429. Report to Mr. Gutierrez." The accused knew where he was supposed to be, and he didn't do it. Mr. Gutierrez, as well, told you he had previously told the accused, "Report to me every morning at 0700, here at Building 429." He knew where he was supposed to be, and he wasn't there. We don't have to say anything more about that charge. Guilty of specification 1 of Charge III.

With regard to specification 2, the last offense that we proved. Again, let's look at the evidence. Mr. Gutierrez, on the stand, states that on the 29th of April, the accused didn't show up for work. So, we go through the same procedure. Again, with him waiting and calling Master Sergeant Robinson. This time, Master Sergeant Robinson testified that he couldn't find him either. He wasn't around. Mr. Gutierrez never heard a word from him from that time until—



well, he testified yesterday that that was the first time he has seen the accused since his disappearance. The accused never contacted him to tell him that he was in trouble or that he needed help. Master Sergeant Robinson testified he couldn't find him. Again, the accused never contacted him or told him he needed help. In fact, the next time that we hear anything of the accused is on the 13th of May, when the Iowa Highway Patrol calls and says that they have Airman Scheffer.

Trooper Steffen testified that he pulled him over, and that the accused told him, again, as I mentioned earlier, "I'm on leave from the Air Force. I'm going to Indiana, and back home to California." It was after he knew it was up, that he had been caught when he was sitting in jail, that he tells [347] him "I guess you know I'm AWOL." He lies every opportunity he gets.

There has been evidence in this case that the accused was running because he was fearful. He was fearful that people were out to get him because of his work with the OSI. Again, stop and look at that evidence; his belief that people were out to get him. Because if you believe that, in fact, he was under duress and had to run, you have to return a finding of not guilty. Let's look at that for a minute. The only person who has brought up any of those facts is the accused. He is the one that says "Billy Fink is so bad." He is the one that says "Robert Davis is so bad." You know these two horrendous drug dealers. They don't find anything at their places when they search them.

Let's go to the 24th of April 1992, the bust on Robert Davis' home. Special Agent Shilaikis, again

on the stand, told you that, in fact, on that evening he received a phone call from the accused. Was he scared? No. Was he upset? Yes. The words of Special Agent Shilaikis on the stand, he said, "Airman Scheffer was pissed off." He wanted to be in on it. He wasn't scared. No fear at all. Special Agent Shilaikis has no reason to get up here and lie to you. He was mad. He wasn't scared.

Now, we've heard testimony from the accused's parents. The father said that he did receive a phone call from his son, and that he told him that he had to get out of here. But, he doesn't remember when it happened. In fact, he told you it could have been sometime in May. It wasn't necessarily on the 30th. Now, Mrs. Scheffer has testified that it was on the 30th of April that the accused came to her. That she saw his hand, and that his hand was bleeding. Then she saw some glass in the back of the truck. She doesn't know if those windows were shot out. She doesn't know if he took his fist and popped the window. He had a bloody hand.

Again, the only evidence is coming from him and his credibility. His lack of credibility.

One other point, on the 30th he has to run. Where was he on the 29th? Mr. Gutierrez and Master Sergeant Robinson told you it was the 29th that he didn't show up for work. He was [348] officially put on AWOL status on the 30th—had to wait 24 hours. Where was he on the 29th? He lacks credibility.

There is only person in here who has a reason to lie. Again, look at the Robert Davis story. Armed to the teeth in drugs. Nothing. He did do one controlled buy from him for recreational use for \$80.00. That

was it. But, when they do the search of Robert Davis' home—nothing. Billy Fink's home—nothing. He tells Ruth Watson, "I've lost all of my temporary checks." Again, a lie, because you have in front of you that he had four of them, at least. He wrote four checks, off of those temporary checks, after he told her he had lost them all. Another lie. He told Trooper Steffen, "I'm on leave." Another lie.

This individual has no credibility. The only way you can find him not guilty of these offenses, is if you believe his story. If you are to believe that, this time he is telling the truth. Maybe he lied in the past. But, he's telling us the truth now. That's the only way.

He knowingly and wrongfully used methamphetamine. He wrote those checks. When he wrote them, he knew he had no money in his account. He was defrauding those individuals. Seventeen different checks from an account with no money in it. He failed to go. It's obvious. And, he went AWOL not under any duress, but because he didn't want to be in the Air Force any more. On that last charge, think about it. What safer place to be than March Air Force Base. If you are worried about individuals off-base, get on base and stay on base. He is lying to you. He is guilty of all charges. We ask that you return findings of guilty on each and every charge. Thank you.

MJ: Captain Williams, given trial counsel's argument, that discussion that we had yesterday regarding your argument on duress no longer applies. In other words, the limit I put on you no longer applies.

IMC: Colonel Fullenkamp and members of the court, let me try and correct a misstatement of the law that

the prosecution just gave you there. The judge told you what the law is. Prosecution says that the only way that you can find the accused not guilty is if you believe his story. That is absolutely [349] wrong. The law is that if the government has not met its burden of proving each and every element of every offense beyond a reasonable doubt, then you have to find him not guilty.

Now, earlier in the trial the judge emphasized the fact that the defense does not have to put on any evidence, because the burden of proof is on the prosecution, throughout the entire trial—to each and every element of the offense, beyond a reasonable doubt, to prove that Airman Scheffer committed these crimes. The judge, in fact, told you that we did not have to put on any evidence. We didn't have to dispute the urinalysis testing, for example. The judge has told you that, in fact, the burden at no time shifts from the prosecution to Airman Scheffer. And the judge told you that if the prosecution does not prove all of the necessary elements of the offense beyond a reasonable doubt, then Airman Scheffer must be acquitted.

So, let's look at Charge I. Focus on the very first element that the judge read to you concerning that charge. In this case, the prosecution failed to put on any evidence at all of where these checks were written. He is accused of writing them in Moreno Valley. There is no evidence here. Look at where the check is written—national chains. Look at the time that they are written. After the 28th of April, the government says they don't know where he was. The 13th of May, he ends up in Iowa. So, we know that to get from California to Iowa you are not magically



transported there in your car. You have to go through different States—Arizona, Colorado, Kansas. No evidence.

Let's look for a little bit at Charges II and III, because the facts are kind of interrelated. The OSI asked Airman Scheffer to come work for them as a source. To work for the OSI against drug dealers. When the OSI talked to him about that, Airman Scheffer went and talked to his dad.

His dad got on the stand and told you that he told his son, "This is not a good idea. You don't have any real marketable skills to offer these guys. If things turn out good for them, it will be good for you. If things go bad then they will just throw you away. They will discard you." That is what he knew from his dad up front. A little bit of a [350] prophecy there.

Now, despite his dad's advice, he went ahead and worked for the OSI. He talked to them. They told him what they wanted him to do. He was willing to do it. The OSI told Airman Scheffer what the procedures they would use would be. He was willing to follow those procedures. Now, why do they have those procedures? Agent Shilaikis said, "Because the OSI was absolutely concerned about the safety of their sources." Why? Because he said on the stand that sources had been burned in the past. They told Airman Scheffer up front that they would be asking him periodically for consensual urinalysis. He understood that. No problems. He was told by the OSI that it would help his credibility as a source if, in fact, he took these consensual urinalyses as asked. He understood that. It made a lot of sense. No problems. Airman Scheffer had every reason to remain clean and to

help the OSI, and to get the help from them that they kind of indicated that he would get in return.

Now, the first urinalysis he took in March, before they started working him against these drug dealers, turned up negative. The second urinalysis, the one in April he took after he had been working for the OSI against these drug dealers for about a month, supposedly turned up positive.

Do you remember the OSI agents telling you about the consensual urinalysis that Airman Scheffer took? Do you remember Special Agent Shilaikis on the stand, saying that as well as consensual urinalysis, there is a probable cause urinalysis, and there is a command directed urinalysis? But, the one that Airman Scheffer took was a consensual urinalysis. The OSI agents explained the consensual urinalysis form. They explained the procedures. They showed you the form that Airman Scheffer signed saying he consented. The consent form that Airman Scheffer was willing to sign. The consent form that Airman Scheffer absolutely did not have to sign. And the consent form that someone who knew drugs were in their system, and the urinalysis was going to come up positive, would not have signed it.

Now, the prosecution has a little problem with this litigation package. They went to great lengths to tell you about the consensual urinalysis; but on page 2 of the litigation [351] report it says this was a probable cause type of test. All right, that aside. Let's look at whether the prosecution has proved beyond a reasonable doubt that Airman Scheffer knowingly ingested methamphetamine or that any ingestion was wrongful.



Now, the OSI, before they could get Airman Scheffer to buy drugs from these people, had to have him re-establish relationships with them. He spent time with them, and when he spent time with them, he testified,—sometimes he spent weekends, evenings and ate meals with them. A lot of times, either one of the drug dealers, or girlfriends or whoever, sometimes Airman Scheffer would go out and get some fast food,—pizza, Mexican food, something to drink—bring it back and they would eat wherever they were at—Davis' house. At the time he was working with the OSI against these drug dealers, methamphetamine was out. Sometimes when he was eating there, he would have to get up and go to the bathroom for whatever reason; he wasn't always attending his food or the large 44 ounce soda that he got. Doctor Jain testified that methamphetamine is easily soluble—it will dissolve—in soda. Agent Shilaikis testified that he heard of people having their drinks spiked with illegal drugs. Now, the government said that they want you to think that you are gullible enough to buy his story about someone spiking their drinks. Well, you heard from the government's own witness, Special Agent Shilaikis, that he knows of people spiking other peoples drinks with illegal drugs. So, their own witness told you that. Now, the prosecution also wants you to believe that there is no one in the world, other than Airman Scheffer, who could have had access to the methamphetamine that was used to spike his food or drink. But, that's not true. They want you to think that there is no way you should believe Airman Scheffer on anything. Of course, the OSI believed him. They believed what he said was true about Billy Fink. They had him work against Billy Fink. He told them that Billy Fink was a drug

dealer. They believed him. How do we know that they believed him? They told him, "We want you to do a controlled buy. We will give you some money. We want you to go to Fink's house. We want you to buy drugs. Come back." So, they did that. They searched him first. They searched his car. Why? To make sure that he didn't have any drugs in his car, so if this went to trial, Davis wouldn't be able to say, "Hey, hey, [352] Scheffer brought the drugs to me." Absolutely out of the question. Ruled out. They gave him 100 bucks. They followed him to Davis' apartment. He went up to Davis' apartment. He bought the drugs. He came back and gave OSI a sixteenth of an ounce of methamphetamine. Now, the prosecution wants you to believe that the methamphetamine fairy came down and gave Airman Scheffer these drugs. Because it certainly couldn't have come from innocent Mr. Davis, who the prosecution would really like you to believe is not really a drug dealer, but some figment of Airman Scheffer's imagination. But, the OSI believed him, and they got their drugs from him. They knew that Davis was a drug dealer. And the prosecution would also like you to believe that Airman Scheffer wasn't being true when he told the OSI about Billy Fink, and that Billy Fink was a drug dealer. Again, drug dealing Billy Fink, according to the prosecution, must be another figment of Airman Scheffer's imagination. However, the OSI came on and testified that they positively identified this Billy Fink as being out of jail, on felony probation. For what? Child Molestation? No. For methamphetamine distribution. He was a meth dealer. Prosecution tried to say that the only evidence that Billy Fink was a meth dealer came from Airman Scheffer's own mouth. That's not true. The OSI said, "Yup, we knew it."

The West End County Task Force knew it. Billy Fink, convicted methamphetamine dealer, out on felony probation.

Prosecution also wants you to believe that these drug dealers are potentially armed and dangerous, is another figment of Airman Scheffer's imagination. Well, the West End County Task Force knew better. They work with drug dealers everyday. They work on busting drug dealers. They knew that these guys are dangerous characters. They knew that they are frequently armed and dangerous. How do we know they knew that? Well, when the West End County Task Force, along with the OSI, went and busted Davis' and Fink's house, did they just walk in there and say "Hi, here we are, we'd like to search your house?" No. They all had bulletproof vests on. There were between five and ten of them. They are only expecting one guy in there. Between five and ten officers of the West End County Task Force, with bulletproof vests, armed to the hilt, guns out of their holsters, ready to go in. Why? It certainly wasn't because they thought this was a figment of someone's imagination. They knew that [353] drug dealers are frequently armed and dangerous characters. The OSI also knew that drug dealers are frequently armed and dangerous characters. Anybody who watches TV, evening news, here in Southern California, knows that drug dealers are frequently armed and dangerous characters. It appears that the prosecution are the only people in the courtroom that don't know that drug dealers are frequently armed and dangerous characters. We also know from watching the news, virtually every night, that drug dealers and gang members are shooting each other. Shooting each

other. Sometimes they hit the people they intend. Sometimes they shoot innocent people.

Now, Agent Shilaikis testified that he didn't tell Airman Scheffer about the raid. And that later that night, about 11:00 o'clock at night, he got a call from Airman Scheffer who was upset. He was upset because he didn't know what had happened. He ran into Robert Davis. What did Davis say? He said, "Scheffer, you so and so, the cops raided my house, and I think that you finked on me." Davis thought that Airman Scheffer—had snitched on him to the police. He had. He was right. Armed and dangerous drug dealers, who suspect that someone has ratted them out to the cops, are exactly the kind of people who have the will, and are exactly the kind of people that want to get revenge and can get revenge. They are willing to use their weapons on people who snitch on them. That's what happened.

Now, the OSI, supposedly being professional law enforcement officers, after realizing that Airman Scheffer's life was in danger, that the folks—the drug dealers—that he was working against, thought he was the one who had snitched out on them, should have said, "Listen, it's time to stop. Stop this operation. Don't talk to Davis anymore. Don't contact him. Stay here on the base. Stay away from these guys. They are dangerous." Did they do that? No. Agent Shilaikis said, "We will try and have him work against them later." What happened? A week after the raid, Airman Scheffer showed up at his mom's house. He was scared. He was agitated. He was upset. Mrs. Scheffer, who has absolutely no reason to lie, came in and said, "My son's hand was cut and bleeding." She noticed it. She said, "What's wrong?"



He said that he had gotten cut on his hands taking broken windows out of his truck, because they had just been [354] blown out. Somebody had just tried to kill him. She looked in the back of his pick-up bed, and there was the cracked window. This was no figment of Mrs. Scheffer's imagination. Airman Scheffer, at that time, told his mom, "I got to get out of town. People are shooting at me. I'm not going to stick around here." Later that evening,—and the prosecution wants to quibble with Mr. Scheffer's memory of the day, but I asked and he clarified that he, in fact, talked to his son later in the evening that his windows got shot out. So, he talked to him on that same day. He was upset. He was almost hysterical. His dad said, "Normally, I can calm him down, but I couldn't calm him down that night." He told his dad, "I got to get out of town. Somebody is trying to kill me." That was Airman Scheffer's mind when he left the local area to find a safe place to stay. He feared for his life. He fled for safety.

Now, the government wants to make it a big case out of the fact that when he was stopped, Airman Scheffer didn't tell Trooper Steffen the truth. Well, he was faced with a little bit of a quandary there. Do I tell this police officer the truth, that I'm not on leave, and have him take me back to Southern California, where people are trying to kill me; or do I tell a little fib and hope that he will let me go on my way to safety? His was an easy and logical choice to make. He made it.

Members of the court, in conclusion we would argue that, in fact, the government has not met its burden. They have not proved to you beyond a reasonable doubt all the evidence necessary to support each and

every element of Charge I, Charge II or the AWOL. As a result, a finding of not guilty should be returned for these charges.

Now, the prosecution gets another chance to come and talk to you. This is our last chance. I would ask you to consider, when you listen to the prosecution's argument, what we would say in response to that argument, in your deliberations. Thank you for your time.

MJ: Captain Russell.

ATC I: Thank you, Your Honor.

[355] First of all, I want to clear up the misconception of what I said; that the only way you can find him not guilty is by believing his story. I in no way meant to place the burden of proof on the defense. To the defense and to Airman Scheffer, I apologize for that.

But, the facts are proven beyond a reasonable doubt. Let's go back through these offenses one last time.

The meth use. We didn't say that a drink couldn't be spiked, or that the food can't be spiked. We didn't say that. Yes, it's possible, but is it probable? Are you going to throw money away? Pull that billfold out, throw that money in there for no apparent reason. But, more than that, is that the accused told you he knows what the effects of methamphetamine are. He told you on the stand that he never felt it. That's the improbable. That's the impossible and implausible part of this; is that he never felt it. He knows what methamphetamine feels like. He is telling you he never felt it. Again, the defense brought it up that he consented to this urinalysis. He sure did. He con-



sented. And, on the 6th of April, that evening, and on the morning of the 7th, he worked like a dog to come up with a story to cover his tail. That's what he did. What did he tell you? Just remember that. Just keep remembering that story; that hokey story that he related to you. It doesn't even make sense. You can't become unconscious with meth use, and that's what he is telling you happened. Don't believe it. He felt the effects, because he knowingly used it.

Again, the checks. You can infer from looking at the checks, up to the 30th of April, that he was in Moreno Valley. As far as the other checks, we don't know. That's for you to decide—those other three checks. We have no evidence from the 30th of April until the 13th of May that he wasn't in Moreno Valley. All we know is that on the 30th of April he was here, and on the 13th of May he was found in Iowa. You can infer that. Again, look at the dates of those checks. He wrote them all after he said he lost his temporary checks. He wrote them after there was no money in his account. When he started on the 1st of April, he knew there was no money in that account. He had the intent to defraud all of those different individuals and companies. He is guilty of the first charge.

[356] Failure to go, there is no question on that.

Let's go back to the AWOL for a moment. It still goes back to credibility.

We're not trying to tell you that Robert Davis and Billy Fink don't use drugs. And the defense got up here and said the West End County Task Force went in armed through the teeth, bulletproof jackets, weapons drawn. Why did they do that? Because of what the

accused had told the OSI. He is the one that said they were armed to the teeth, had pounds of drugs. The OSI is not supposed to believe him at that point? The West End County Task Force is not going to believe the OSI? The only reason they went in that way is because of what the accused had told them, based on his information. Again, what did they find? Nothing. Yes, he did one buy. A recreational use from Robert Davis. Are we saying those two are clean? No. Are they armed and dangerous? We have no evidence of that whatsoever.

On the 24th of April 1992, after this bust, if the accused was so scared and so frightened, thought his life was in peril, why didn't he tell the OSI, "I'm out of here?" He wasn't working full time for the OSI; he was in transportation. But, why didn't he tell Special Agent Shilaikis or anyone else over there, "That's it, I'm through, they're going to get me.?" It never happened. He is a big boy. He could have walked away from this. Trying to say that the OSI was out to burn this individual is wrong. There is no evidence of that whatsoever. They weren't leaving him out there hanging in the wind. He never said anything to the OSI about being scared, or that his life was in danger. That's coming from the accused.

As for the testimony of the parents, every parent wants to believe that their child is a good child—each parent. Consider the fact that they are his parents. But, again, consider that neither one of them saw anyone shoot out the windows. The father didn't even see the truck. He talked to his son on the phone. The mother saw the truck. She saw a bloody hand, as well. She didn't see any bullets fired. All she saw was a

bloody hand and some broken glass. Nothing to say, that it happened the way he said it happened.

[357] Again, the burden of proof is on the government. The government has proven each and every one of these offenses beyond a reasonable doubt. The only verdict that you can come back with is a finding of guilty on each charge and each specification. Thank you.

\* \* \* \* \*

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FILED

JUL 3 1997

CLERK OF THE COURT

No. 96-1133

# In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

*v.*

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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### QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1996

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No. 96-1133

UNITED STATES OF AMERICA, PETITIONER

*v.*

EDWARD G. SCHEFFER

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 44 M.J. 442. The opinion of the Air Force Court of Criminal Appeals (Pet. App. 25a-53a) is reported at 41 M.J. 683.

**JURISDICTION**

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 18, 1996. On December 10, 1996, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 16, 1997. The petition was filed on that date and was

granted on May 19, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1259(3).

#### **RULE AND CONSTITUTIONAL PROVISIONS INVOLVED**

Military Rule of Evidence 707 provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth and Sixth Amendments to the United States Constitution are *reprinted at* Pet. App. 77a-78a.

#### **STATEMENT**

Following trial by a general court-martial, respondent was convicted of uttering 17 insufficient-funds checks, using methamphetamine, failing to go to his appointed place of duty, and wrongfully absenting himself from the base for 13 days, in violation of Articles 123a, 112a, and 86 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 923a, 912a, and 886. He was sentenced to 30 months' confinement, to forfeiture of all pay and allowances, and to a bad conduct discharge. The Air Force Court of Criminal Appeals affirmed, with the proviso that respondent should receive credit for one day's forfeitures. Pet.

App. 25a-53a. The Court of Appeals for the Armed Forces reversed and remanded. *Id.* at 1a-24a.

1. a. This case involves the constitutional validity of a rule excluding from court-martial proceedings in the armed forces any evidence of a polygraph examination. A polygraph examination is intended to produce an assessment of credibility; it is based on an examiner's subjective interpretation of physiological responses that are controlled by the subject's autonomous nervous system. The theory behind polygraph testing is that deception causes physiological reactions that are involuntary and that such reactions may be measured and interpreted.

While individual tests vary, polygraph examinations generally follow a common format. After a preliminary interview with the subject, the examiner asks a number of questions while measuring the subject's relative blood pressure (obtained from an inflated cuff on the upper arm) and other indications of blood flow, his "galvanic skin response" (*e.g.*, palmar sweating), and his respiration (obtained from sensors placed on the subject's chest or abdomen). The polygraph instrument records physiological responses on a chart, and the examiner manually marks when a response is uttered. The questions asked in most tests ordinarily fall into three broad categories: direct questions concerning the matter under investigation, irrelevant or neutral questions, and more general (so-called "control") questions concerning whether the subject has possibly engaged in other wrongful acts similar to the one under inquiry. The examiner poses the control questions in such a way as to elicit anxiety and a possibly deceptive response, in order to see a benchmark of the subject's physiological reactions when exhibiting concern about

lying. There are no standardized questions in a polygraph examination; the examiner devises the questions for the individual subject and may refine them after the preliminary interview. Each question is worded to elicit a "yes" or "no" answer. The test is typically limited to ten questions, because "[t]he restriction of blood flow in the arm produces ischemic pain after several minutes." W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in 1 *Modern Scientific Evidence* § 14-3.1.1, at 583 (D. Faigman et al. eds., 1997).

The examiner forms an opinion with respect to the subject's truthfulness by comparing the subject's physiological reactions to each set of questions. See generally 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-2(B), at 219-222 (2d ed. 1993); C. Honts & B. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D.L. Rev. 987, 989-993 (1995). If the responses do not elicit a significant enough variation in response, the examiner can adjust the polygraph instrument so that the recordings during the examination are more pronounced. The subject is usually required to be measured answering each set of ten questions (with the questions asked in varying orders) three different times. The polygrapher may base his inference of deception by comparing physiological responses (as recorded in peaks and valleys on the chart) to relevant and control questions. See generally Gianelli & Imwinkelried, *supra*, at 218.

b. In *United States v. Gipson*, 24 M.J. 246 (1987), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) concluded that polygraph techniques had reached a sufficient degree of reliabil-

ity that evidence of a polygraph examination should not be routinely excluded from court-martial proceedings under Military Rule of Evidence 702.<sup>1</sup> The court noted that "[i]f anything is clear, it is that the battle over polygraph reliability will continue to rage," but it concluded that "until the balance of opinion shifts decisively in one direction or the other, the latest developments \* \* \* should be marshaled at the trial level." 24 M.J. at 253. Accordingly, the court held that a serviceman who testifies at his court-martial trial is entitled to lay a foundation showing the scientific basis for polygraph results consistent with his exculpatory testimony. *Id.* at 252-253.

On June 27, 1991, "[b]y the authority vested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [i.e., the UCMJ]," the President responded to *Gipson* by promulgating Military Rule of Evidence 707.<sup>2</sup> See Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.). The drafters' commentary that ac-

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<sup>1</sup> Military Rule of Evidence 702, like its counterpart in the Federal Rules of Evidence, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

<sup>2</sup> Article 36(a) of the UCMJ, 10 U.S.C. 836(a), provides that "[p]retrial, trial, and post-trial procedures, including modes of proof \* \* \* may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."



companied the rule explained its adoption by reference to several policies:

There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near-infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). \* \* \* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the [court-martial] members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of the polygraphs. \* \* \* Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system.

Pet. App. 82a-83a. Those considerations, the drafters stated, warrant "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial." *Id.* at 83a.

2. On March 27, 1992, respondent, an airman stationed at March Air Force Base, California, opened a checking account with the Security Pacific Bank with a \$277 deposit. He made no arrangements for his pay to be deposited into the account, and he withdrew \$200 on the same day the account was opened. On March 31, 1992, respondent telephoned the bank and

stated that he had lost his ATM card and the temporary checks that the bank had issued for the account. He was apparently told that the account would be closed for security reasons. After that telephone call, between April 1 and May 3, respondent wrote 17 checks on the account, totalling approximately \$3,300 in checks drawn on insufficient funds. See Pet. App. 25a; 3 Trial Rec. 237-245, 249.

In late March 1992, as he was beginning the Security Pacific scheme, respondent volunteered to assist the Air Force Office of Special Investigations (OSI) with drug investigations, and informed OSI that he had information on two civilians who were dealing in significant quantities of drugs. Pet. App. 2a, 26a. On April 7, 1992, one of the OSI agents supervising respondent requested that respondent submit to a urine test. Respondent agreed, but he stated that he could not provide a urine specimen then, because he urinated only once a day. He submitted to a urinalysis on the following day. On May 14, 1992, OSI agents learned that respondent's urine had tested positive for methamphetamine. *Id.* at 26a-27a.

On April 10, 1992, two days after providing a urine sample, respondent agreed to take a polygraph administered by an OSI examiner. According to the examiner, respondent's polygraph charts "indicated no deception" when respondent denied that he had used drugs since joining the Air Force. Pet. App. 2a-3a, 26a-27a. Later that month, on April 30, 1992, respondent unaccountably failed to appear for work and could not be found on the base. Respondent was not heard from again until May 13, 1992, when an Iowa State Patrolman telephoned the base with news that respondent had been arrested in that State following a routine traffic stop; upon learning that respondent

was AWOL, the patrolman held respondent for return to the base. See 3 Trial Rec. 258-259, 265-267.

At his trial, respondent advised the court that he intended to testify in his defense, and that he wished to rely on "the results of the exculpatory polygraph" to corroborate "an innocent ingestion defense" to the drug charges. 2 Trial Rec. 42, 43-44. Respondent argued that Rule 707 "is unconstitutional if it prohibits an accused from introducing relevant and helpful exculpatory evidence," and he argued that he should be permitted to lay a foundation "to show that in this particular case \* \* \* the polygraph results are relevant and helpful." *Id.* at 44.

The military judge noted that "[f]or evidence to be helpful, the testimony of the polygrapher would have to be in an area in which the factfinder himself needs help in making a decision." 2 Trial Rec. 46. In his view,

the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant.

*Ibid.* The military judge also noted that "[t]he fact finder might give \* \* \* too much weight" to polygraph testimony, and that arguments about such testimony could take "an inordinate amount of time and expense. \* \* \* Given those concerns, I don't believe that the constitution prohibits the President from appropriately ruling that polygraph evidence will not be admitted in a court-martial." *Ibid.* Respondent later testified that he did not recall "knowingly" ingesting methamphetamine. He was convicted. Pet. App. 3a-4a.

3. The Air Force Court of Criminal Appeals, sitting en banc, rejected respondent's contention that the exclusion of the polygraph evidence deprived him of a fair trial. Pet. App. 25a-53a. After reviewing this Court's decisions in *Washington v. Texas*, 388 U.S. 14 (1967), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44 (1987), see Pet. App. 32a-35a, the court concluded that the Constitution forbids evidentiary rules that "arbitrarily limit the accused's ability to present reliable evidence," "arbitrarily limit admission [of evidence] by the defense to a greater degree than by the prosecution," or "arbitrarily infringe on the right of the accused to testify on his own behalf." *Id.* at 40a.

The court noted that Rule 707 is "equally applicable to both the prosecution and the defense" and does "not infringe on the right of the accused to testify on his own behalf." Pet. App. 43a. It also observed that Rule 707 could not be viewed as an "arbitrary" limitation on reliable evidence, because "[t]he President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning." Pet. App. 40a. The court explained that there remain "valid concerns" about polygraph examinations and that:

The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the value of the evidence.

*Id.* at 41a. The court concluded "[w]hile it might be arbitrary for the President to promulgate a rule" barring evidence that is widely accepted by courts as



reliable, "such as fingerprint evidence," (*id.* at 43a), the President acted within his authority in barring polygraph evidence, which routinely is ruled inadmissible by the civilian courts (*id.* at 42a-43a).

Judge Pearson, joined by Judge Schreier, dissented in part. Pet. App. 49a-53a. He believed that properly conducted polygraph examinations may provide "vital" evidence in a case in which the defendant's credibility "becomes the whole ball game." *Id.* at 51a.

4. By a three to two vote, the United States Court of Appeals for the Armed Forces reversed. The court agreed with respondent's claim that Rule 707 "violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by" respondent. Pet. App. 4a. Assuming that the President properly promulgated Rule 707 pursuant to the UCMJ, see Pet. App. 7a, the court concluded that, under *Rock v. Arkansas*, *supra*, the President's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." Pet. App. 8a (quoting *Rock*, 483 U.S. at 61). The court acknowledged that *Rock* "concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony," but it could "perceive no significant constitutional difference between the two." Pet. App. 9a.

Finally, the court noted that in *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996), this Court upheld a state "statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue." Pet. App. 13a. The court observed, however, that *Egelhoff* was a "fragmented" decision that is best read as "founded on the power of the state to define crimes

and defenses." *Id.* at 14a. The court also found *Egelhoff* inapposite because Rule 707 does not address a fact to be proved, but instead "bars otherwise admissible and relevant evidence based on the mode of proof by categorically excluding polygraph evidence. While the plurality in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n.1, only four justices joined in that observation." Pet. App. 15a.<sup>3</sup>

Judges Sullivan and Crawford filed separate dissents. Pet. App. 16a-24a. Judge Sullivan's dissent was based on his concurring opinion in *United States v. Williams*, 43 M.J. 348 (C.M.A. 1995), cert. denied, 116 S. Ct. 925 (1996), a case in which the court of appeals had declined to address the constitutional validity of Rule 707, because the accused did not testify. Pet. App. 67a-68a. Writing separately in *Williams*, Judge Sullivan concluded that polygraph evidence is inadmissible under Military Rule of Evidence 608, which restricts what evidence may be offered in support of a witness's "character for \* \* \* truthfulness." *Id.* at 75a. Judge Sullivan believed, moreover, that such evidence "infringes on the jury's role

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<sup>3</sup> The court also noted that in *Wood v. Bartholomew*, 116 S. Ct. 7 (1995) (*per curiam*), this Court summarily reversed the Ninth Circuit's determination that a state prosecutor violated his duties under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the results of certain polygraph examinations. Pet. App. 12a-13a. The court observed that *Bartholomew* involved "prosecution witnesses, not the accused," and it added that while this Court "noted that polygraph evidence was inadmissible under [state] law, \* \* \* [t]he constitutionality of the state law was not before the Court and \* \* \* was not addressed." *Id.* at 12a-13a.



in determining credibility," because "[o]ur adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes." *Id.* at 75a-76a (internal quotation marks omitted). In his view, Rule 707 "properly" addresses those concerns. *Id.* at 76a.

Judge Crawford argued that a defendant's right to present relevant evidence "is 'not \* \* \* absolute'," and must yield to policy considerations such as those that supported the President's decision to adopt Rule 707. Pet. App. 17a, 21a. She also took issue with the court's characterization of *Egelhoff*, noting that the four-Justice plurality and the four dissenting Justices agreed "that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so." *Id.* at 21a. Finally, Judge Crawford argued that the court's ruling would have a seriously adverse impact on the military's "worldwide system of justice." *Ibid.*

#### SUMMARY OF ARGUMENT

I. Military Rule of Evidence 707, which establishes a per se bar on the admissibility of polygraph evidence in courts-martial, is valid under the Sixth Amendment. A polygraph is an instrument that records physiological responses to questions and produces data that an examiner interprets to form a subjective opinion about the subject's credibility at the time. It is based on the theory that deception results in essentially uncontrollable responses by the subject's autonomous nervous system, and that those responses can be interpreted as evidence of honesty or deception.

A criminal defendant does not have an unqualified right under the Sixth Amendment to present any evidence that is arguably relevant to a fact at issue.

Rather, trial proceedings are governed by rules of evidence that are themselves designed to produce a reliable result and to further valid policy interests. Many evidentiary rules restrict or preclude admission of relevant and probative evidence, and such rules are constitutional so long as they are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

A per se rule prohibiting admission of polygraph evidence serves legitimate interests. First, for decades scientists have engaged in an arguably unresolvable debate over whether polygraph examinations are reliable. Significant doubts persist about whether polygraphs are verifiable and replicable. That scientific disagreement makes it particularly appropriate for courts to defer to the appropriate rule-making authority's determination to bar polygraph evidence. The rule is further supported by the intrusion of polygraph evidence on functions traditionally performed by the trier of fact: assessing credibility and deciding the ultimate issue of guilt or innocence based on all of the evidence adduced at trial. A per se rule against polygraph evidence also avoids unnecessary collateral litigation over the evidentiary value of a polygraph result in any given situation. Finally, the existence of widespread judicial support for exclusion of such evidence further justifies the President's reasonable judgment in promulgating the per se prohibition on admission of polygraph evidence.

II. Not only does the decision by the court below conflict with general principles of Sixth Amendment jurisprudence, it is particularly unwarranted in the military context, where deference to the political branches of government is at its apex. It is well settled that the constitutional requirements for trials in

civilian life do not necessarily apply with equal force to courts-martial and that procedural restrictions may be appropriate in the military context in view of the specialized nature of military life and the military's primary function to defend the Nation. Thus, a servicemember challenging the rule has an "extraordinarily weighty" burden in "overcom[ing] the balance struck by Congress." *Weiss v. United States*, 510 U.S. 163, 177-178 (1994). In light of the substantial reasons for prohibiting admissibility of polygraph evidence, respondent cannot meet that burden.

### ARGUMENT

#### I. THE PER SE EXCLUSION OF POLYGRAPH EVIDENCE IN A CRIMINAL CASE IS VALID UNDER THE SIXTH AMENDMENT

##### A. Restrictions On The Admissibility Of Evidence Are Constitutional If They Are Reasonable And Serve Legitimate Interests

Although the Constitution guarantees a fair trial through the Due Process Clause, the Sixth Amendment defines "the basic elements of a fair trial," including the right to confrontation, the right to compel testimony, and the right to counsel. *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984). Those Sixth Amendment rights "guarantee[] criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)), so that the trier of fact "may decide where the truth lies," *Washington v. Texas*, 388 U.S. 14, 19 (1967). As this Court has observed, the right to present a complete defense would be an "empty one" if the government were permitted to exclude competent, reliable evidence that is central to the defendant's

claim of innocence, for the exclusion of such exculpatory evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690-691 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

Nevertheless, a defendant's right to present relevant evidence in his defense is not absolute. The Court has consistently recognized that "[n]umerous state procedural and evidentiary rules control the presentation of evidence." *Rock v. Arkansas*, 483 U.S. 44, 55 n.11 (1987); *Washington v. Texas*, 388 U.S. at 23 n.21. Under those rules, a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Testimony may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see the evidence admitted." *Crane*, 476 U.S. at 690; see *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (upholding exclusion of defense evidence for failure to comply with notice requirement).

The principle that a defendant may not require a court to admit all relevant, exculpatory evidence runs throughout the standard rules of evidence. For example, the Federal Rules of Evidence authorize a court to exclude relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (Fed. R. Evid. 403); evidence of other crimes or wrongs to prove character in order to show action in conformity therewith (Fed. R. Evid. 404(b)); evidence covered by a rule of privilege (Fed. R. Evid. 501); expert testimony that is insufficiently reliable



to amount to “scientific knowledge” that would “assist the trier of fact” (Fed. R. Evid. 702); expert testimony on an ultimate issue of a criminal defendant’s mental state constituting an element of the crime (Fed. R. Evid. 704); and hearsay evidence unless covered by an exception (Fed. R. Evid. 802). Although some of those rules permit case-by-case adjudication of the admissibility of a particular item of evidence, others operate in a categorical fashion to establish per se rules of exclusion.<sup>4</sup>

In reviewing the constitutionality of an evidentiary rule of exclusion, this Court looks to whether the rule is “arbitrary or disproportionate to the purposes [it is] designed to serve”—that is, “whether the interests served by [the] rule justify [its] limitation” on the admission of evidence. *Rock*, 483 U.S. at 56; *Lucas*, 500 U.S. at 151 (“Restrictions on a criminal defendant’s right to confront adverse witnesses and to present evidence ‘may not be arbitrary or disproportionate to the purposes they are designed to serve.’”) (quoting *Rock*, 483 U.S. at 56). As the plurality noted in *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996), in which the Court upheld Montana’s prohibition of evidence of voluntary intoxication on the issue of whether the defendant possessed a requisite mental state, “the introduction of relevant evidence can be limited by the State for a ‘valid’ reason.” *Id.* at 2022 (plurality opinion of Scalia, J.); see *id.* at 2028-2029

<sup>4</sup> For example, the determination whether evidence should be excluded under Rule 403 is typically made on an individualized basis. In contrast, Rule 404(b) is categorical in excluding other act evidence to prove character in order to show action in conformity therewith. See also *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996) (rejecting case-by-case balancing test for psychotherapist-patient privilege under Rule 501).

(O’Connor, J., dissenting) (arguing that Montana improperly barred intoxication evidence for the sole purpose of increasing convictions, whereas “[t]he purpose of the familiar evidentiary rules is \* \* \* to vindicate some other goal or value—e.g., to ensure the reliability and competency of evidence”); *id.* at 2032 (Souter, J., dissenting) (“A State may typically exclude even relevant and exculpatory evidence if it presents a valid justification for doing so.”). Rule 707’s per se exclusion of polygraph results and the opinion of the polygraph examiner is a proportionate means to serve valid interests, and thus does not abridge the Sixth Amendment.

#### **B. A Per Se Rule Excluding Polygraph Results Serves Legitimate Interests In Promoting Fairness And Reliable Fact-Finding**

As the Commander-in-Chief, the President has the authority to promulgate rules of evidence applicable in courts-martial. U.S. Const. Art. II, § 2; 10 U.S.C. 836. Rule 707 evenhandedly bars polygraph evidence whether offered by the prosecution or the defense. The drafters’ commentary that accompanied Rule 707 enumerated several factors underlying adoption of the Rule: (1) the scientific controversy over the reliability of polygraph examinations; (2) the danger that the opinion of the polygraph examiner will intrude on the jury’s function of assessing credibility; (3) the danger that jurors will accord excessive weight to the expert’s testimony; (4) the danger that the focus of the trial will shift from the guilt or innocence of the accused to the validity of the polygraph examination; and (5) the time-consuming collateral litigation to which the admissibility of polygraph evidence would give rise, with the atten-



dant burden on the administration of military justice. See Pet. App. 82a-83a. In light of these valid, nonarbitrary factors, the military's rule excluding evidence of the results of polygraph examinations from courts-martial does not violate the Sixth Amendment.

**1. Legitimate doubt exists in the scientific community over the reliability of polygraphs**

An important function of evidentiary rules is the exclusion of certain categories of evidence that are deemed insufficiently reliable, as demonstrated by the hearsay rule, Fed. R. Evid. 802. See *Egelhoff*, 116 S. Ct. at 2017. One need not take sides in the debate over polygraph testing to recognize that the reliability of such testing is widely questioned by scientists, Congress, and the courts.<sup>5</sup>

a. For more than a century, scientists have conducted numerous studies in attempts to develop verifiable and replicable proof that a subject's lie produces measurable physiological responses. See generally J. Matte, *Forensic Psychophysiology Using The Polygraph* 11-101 (1996) (tracing history of lie detection efforts); S. Abrams, *The Complete Polygraph Handbook* 2-8 (1989) (same). Some studies attempt to create laboratory conditions that mimic experiences

<sup>5</sup> In part for that reason, in federal criminal trials, Department of Justice policy "opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test \* \* \* [and admonishes] [g]overnment attorneys \* \* \* from seeking the admission of favorable examinations which may have been conducted during the investigatory stage" of the case. III(a) U.S. Department of Justice, *United States Attorneys' Manual* § 9-13.310 (1988) (Department Policy Toward Polygraph Use).

of real subjects; others compare information obtained in real cases to verify findings of deceptiveness. The Office of Technology Assessment (OTA) evaluated all of the available studies in a comprehensive monograph published in 1983. See U.S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum* (OTA-TM-H-15, Nov. 1983) (OTA Study). The OTA Study concluded that "no overall measure of single, simple judgment of polygraph testing validity can be established based on available scientific evidence":

There are two major reasons why an overall measure of validity is not possible. First, the polygraph test is, in reality, a very complex process that is much more than the instrument. Although the instrument is essentially the same for all applications, the types of individuals tested, training of the examiner, purpose of the test, and types of questions asked, among other factors, can differ substantially. A polygraph test requires that the examiner infer deception or truthfulness based on a comparison of the person's physiological responses to various questions. For example, there are differences between the testing procedures used in criminal investigations and those used in personnel security screening. Second, the research on polygraph validity varies widely in terms of not only results, but also in the quality of research design and methodology. Thus, conclusions about scientific validity can be made only in the context of specific applications and even then must be tempered by the limitations of available research evidence.

*Id.* at 4. In the years since publication of the OTA study, numerous additional studies of polygraphs have been performed. The validity of such studies has sparked considerable debate.

The editors of the most recent treatise on scientific evidence observe that "[s]cientific opinion about the validity of polygraph techniques is extremely polarized," and accordingly present the arguments pro and con without attempting to resolve definitively whether polygraph testing provides a valid means of ascertaining the credibility of a subject in the various contexts in which such examinations are administered. 1 D. Faigman et al., *Modern Scientific Evidence* § 14-1.4, at 565 n.\* (1997).<sup>6</sup> See also 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-2(C), at 225 (2d ed. 1993) ("The validity of polygraph testing in criminal investigations remains controversial."); see also *id.* at 227 ("A number of authorities have questioned the validity of polygraph testing."). Even strong proponents of polygraph testing only venture to say that "the polygraph is a useful diagnostic tool for assessing truthfulness," while acknowledging that many applications of polygraph tests are "undesirable" and "objectionable." D. Raskin et al., "The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests," in 1 Faigman, *supra*, §§ 14-2.2.3 to 14-2.3, at 581-582. Two critics of the accuracy of polygraphs, however, have

<sup>6</sup> Compare D. Raskin et al., "The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests," § 14-2.0, at 565-582, in 1 *Modern Scientific Evidence* (D. Faigman et al. eds., 1997) with W. Iacono and D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in *ibid.*, § 14-3.0, at 582-618.

maintained that the validity of the control-question testing method of polygraph examinations—the approach preferred by polygraph proponents—"is little better than could be obtained by the toss of a coin." W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in 1 Faigman, *supra* § 14-5.3, at 629. That disagreement confirms the continuing validity of the view of the OTA, whose 1983 report concluded that "[o]verall, the cumulative research evidence suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant." OTA Study, *supra*, at 5.<sup>7</sup>

<sup>7</sup> There is no doubt that the polygraph can accurately measure certain physiological responses to accusatory questioning and that a correlation appears to exist between a fear of detection and a subject's physiological response. Critics argue, however, that these responses have not been shown to be different from physiological responses caused by other emotions:

[T]here is no reason to believe that lying produces distinctive physiological changes that characterize it and only it. . . . [T]here is no set of responses—physiological or otherwise—that humans emit only when lying or that they produce only when telling the truth. . . . No doubt when we tell a lie many of us experience an inner turmoil, but we experience a similar turmoil when we are falsely accused of a crime, when we are anxious about having to defend ourselves against accusations, when we are questioned about sensitive topics—and, for that matter, when we are elated or otherwise emotionally stirred.

Giannelli & Imwinkelried, *supra*, at 216-217 (quoting B. Kleinmuntz & J. Szucko, *On the Fallibility of Lie Detection*, 17 *Law & Soc'y Rev.* 85, 87 (1982)). See also D. Lykken, *The Lie Detector and the Law*, 8 *Crim. Def.* 19, 21 (1981) ("But people do not all react in the same way when they are lying and, more



b. Congress has reached similar conclusions about the accuracy of polygraphs as a means of detecting deceit. After extensive hearings in 1965, the Committee on Governmental Operations of the House of Representatives concluded:

There is no "lie detector." The polygraph machine is not a "lie detector", nor does the operator who interprets the graphs detect "lies." The machine records physical responses which may or may not be connected with an emotional reaction—and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.

H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Following further hearings and study, the same conclusions were reached in 1976. *The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings on H.R. 795 Before the House Comm. on Government Operations*, 94th Cong., 2d Sess. (1976). And in 1988, as a result of continuing doubts about the usefulness and accuracy of polygraphs as a means of detecting deceit, Congress restricted the use of polygraphs in employment decisions. See Employee Polygraph Protection Act of 1988, 29 U.S.C. 2001 *et seq.*

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important, any reaction that you might display when answering deceptively you might also display another time, when you are being truthful"); U.S. Department of Defense, *The Accuracy and Utility of Polygraph Testing* 3 (1984) (noting limitations in research conducted on polygraphs but stating that "the research produces results significantly above chance").

c. Courts have noted the highly subjective nature of polygraph testing. Because a polygraph examination tests a person's physiological reactions to questions posed at a particular time and place, the test is not replicable. Influences as varied as the emotional state of the subject on the day of the test, the room in which the polygraph is administered, the amount of sleep the subject has had the night before, and the number of cups of coffee the subject has consumed before the test may alter the physiological responses to questions. Thus, a person may produce a different polygraph chart in response to the same questions asked on a different day in a different location.<sup>8</sup>

Moreover, the polygrapher conducting the examination injects a high degree of subjectivity into the examination. Although both the American Polygraph Association and the American Association of Police Polygraphists publish standards for the use of polygraphs, neither organization "has the authority to compel members to comply with them," and "an estimated 2,000 other polygraph examiners \* \* \* do not

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<sup>8</sup> Courts critical of polygraph testing have also pointed to the multiple variables that may influence the results of a polygraph test, including the physical and mental condition of the subject, the extent of the subject's nervousness, the subject's attitude toward the examiner, the subject's use of alcohol or drugs, distractions in the examination setting, the extent of a guilty subject's subjective belief in his own innocence, the competence and integrity of the examiner, the phrasing of the examiner's questions, and the appropriateness of the control questions. See, e.g., *Brown v. Darcy*, 783 F.2d 1389, 1396 (9th Cir. 1986); *United States v. Alexander*, 526 F.2d 161, 165 (8th Cir. 1975); *People v. Monigan*, 390 N.E.2d 562, 569 (Ill. App. Ct. 1979).



belong to either society." C. Murphy & J. Murphy, "Polygraph Admissibility," in 10 *National Center for Prosecution of Child Abuse Update* 1 (1997). Accordingly, "[d]ue to the subjective nature of the polygraph (it is not uncommon for polygraphers to reach different conclusions after reviewing the same test results), the potential for abuse by the polygrapher being biased either for or against the suspect ('assisted' polygraph examinations), and the various levels of expertise of the polygraphers, the need for enforceable standards is of paramount importance." *Ibid.* (footnotes omitted). See also *People v. Monigan*, 390 N.E.2d 562, 569 (Ill. App. Ct. 1979) (subjectivity of interpreting test results); *State v. Frazier*, 252 S.E.2d 39, 48-49 (W. Va. 1979) (same); *United States v. Alexander*, 526 F.2d 161, 164 n.6 (8th Cir. 1975) (general lack of training of polygraphers and the absence of adequate professional standards and qualifications); *People v. Anderson*, 637 P.2d 354, 360 (Colo. 1981) (en banc) (same).<sup>9</sup>

There is also evidence that a highly motivated subject (such as a defendant) may employ countermeasures to obscure an accurate reading of physiological

<sup>9</sup> As Giannelli and Imwinkelried note:

Even the proponents of the polygraph technique agree that the examiner, and not the machine, is the crucial factor in arriving at reliable results. The examiner's expertise is critical in (1) determining the suitability of the subject for testing, (2) formulating proper test questions, (3) establishing the necessary rapport with the subject, (4) detecting attempts to mask or create chart reactions, or other countermeasures, (5) stimulating the subject to react, and (6) interpreting the charts.

*Scientific Evidence*, *supra*, § 8-2(A), at 218.

responses.<sup>10</sup> Such countermeasures include hypnosis and biofeedback, ingestion of drugs, and subtle, surreptitious muscular movements during the examination. And although polygraphers can expect a subject to employ countermeasures, "[t]here is no good evidence as to how well these countermeasures work under real life conditions and no evidence at all concerning how frequently such countermeasures are successfully employed in real life by sophisticated subjects." Iacono & Lykken, *supra*, § 14-3.2.5, at 595-596.

A scientific technique whose reliability and helpfulness are so widely questioned by scientists, legislators, and courts may surely be made the subject of a categorical exclusionary rule. As this Court recently noted, "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Kansas v. Hendricks*, Nos. 95-1649 & 95-9075 (June 23, 1997), slip op. 12 n.3 (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)); *id.* at 3 (Breyer, J., dissenting) ("The Constitution permits a State to

<sup>10</sup> Information on countermeasures is readily available. A search on the Internet by the Federal Bureau of Investigation Polygraph Unit produced some 3,000 hits. And many published sources on polygraphs contain discussions of countermeasures. See, e.g., J. Matte, *Forensic Psychophysiology Using the Polygraph* 531-548 (1996); S. Abrams, *The Complete Polygraph Handbook* 185-186 (1989); V. Kalashnikov, *Beat the Boz: The Insider's Guide to Outwitting the Lie Detector* 9-13 (1986). Thus, a highly motivated person who felt the need to attempt to trick the polygrapher could easily find information for that purpose.

follow one reasonable professional view, while rejecting another.”).

**2. The admission of polygraph evidence intrudes on functions performed by the trier of fact**

Even assuming that polygraph testing had a high degree of reliability when properly administered, the President may reasonably be concerned about the potential encroachment of polygraph evidence on the proper functioning of the trier of fact. First, juries may be unduly swayed by the polygraph expert's opinion. As the Eighth Circuit explained in *Alexander*, 526 F.2d at 168:

When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. During the course of laying the evidentiary foundation at trial, the polygraphist will present his own assessment of the test's reliability which will generally be well in excess of 90 percent. He will also present physical evidence, in the form of the polygram, to enable him to advert the jury's attention to various recorded physical responses which tend to support his conclusion. Based upon the presentment of this particular form of scientific evidence, present-day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to a polygraphist's opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case.

See also *Barefoot v. Estelle*, 463 U.S. 880, 926 (1983) (Blackmun, J., dissenting) (quoting P. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980) (“The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.”)). Even if the accuracy of polygraph testing approaches the 90 percent level that polygraph proponents claim,<sup>11</sup> the danger that jurors will view the polygraph “as an absolute indicator of truth creates an overwhelming potential for prejudice when inaccurate results are introduced.” *Brown v. Darcy*, 783 F.2d 1389, 1396 (9th Cir. 1986). The prospect that relevant evidence may “weigh too much with the jury and \* \* \* so overpersuade them” is a legitimate basis for a categorical rule of exclusion. *Old Chief v. United States*, 117 S. Ct. 644, 650 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948) (discussing propensity evidence)).

Second, even if polygraph evidence did not have a potentially pervasive influence on the jury, the admission of such evidence would nonetheless tend to infringe on the jury's role of determining witness credibility. “[T]ruth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and

<sup>11</sup> See, e.g., D. Raskin, *Methodological issues in estimating polygraph accuracy in field applications*, in 19 *Canad. J. Behav. Sci./Rev. Canad. Sci. Comp.* 389, 389 (1987). Raskin's claim has been sharply criticized. See, e.g., Iacono and Lykken, in 1 Faigman, *supra*, at 610.



weight of such testimony to be determined by the jury or by the court." *Rock*, 483 U.S. at 54 (quoting *Washington v. Texas*, 388 U.S. at 22 (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918))). A polygrapher has no such "knowledge of the facts involved in a case," but rather can only purport to speak to the credibility of the subject at one particular examination.

Since time immemorial our system has entrusted credibility determinations to the judgment of juries, which assess credibility in reliance on their common-sense evaluations of demeanor, bias, and the plausibility of the narrative. See, e.g., *State v. Porter*, No. SC 15363, 1997 WL 265202, at \*27 (Conn. May 20, 1997) ("The jury has traditionally been the sole arbiter of witness credibility."); *Perkins v. State*, 902 S.W.2d 88, 94 (Tex. Ct. App. 1995) ("Even though serious doubts remain about the reliability of polygraph evidence, its unreliability is not the primary reason for its exclusion under our holding. Instead, we find that such evidence should be excluded because it impermissibly decides the issues of credibility and guilt for the trier of fact and supplants the jury's function.") (footnote omitted); *State v. Beachman*, 616 P.2d 337, 339 (Mont. 1980) ("It is distinctly the jury's province to determine whether a witness is being truthful."). An expert who opines based on a polygraph examination that a testifying defendant was truthful at the time of the test duplicates the jury's credibility-assessing function. It is entirely legitimate for an evidentiary system to preserve for the factfinder its unique province of weighing credibility based on first-hand observation of witnesses and of making the ultimate determination of guilt or innocence. Cf. Fed. R. Evid. 608 (limiting opinion evidence to support or attack

credibility); Fed. R. Evid. 704(b) ("No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.") .

That is especially true in the case of polygraph evidence. Unlike an abstruse area of science that ordinarily would be beyond the jury's ken unless explained by an expert witness, "[a] determination of whether a witness is telling the truth is well within the province of all jurors' understanding and abilities." *Porter*, 1997 WL 265202, at \*27. See also D. Carroll, "How accurate is polygraph lie detection?" in *The Polygraph Test* 28 (A. Gale ed. 1988), ("an observer, regarding the [polygraph examinee's] general behaviour \* \* \* does just as well as an experienced polygraph examiner"). As one federal court of appeals succinctly put it, "the jury is the lie detector." *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974).

### **3. *A per se prohibition on polygraph evidence serves the legitimate interest of avoiding unnecessary collateral litigation***

Because of the many elements of subjectivity associated with polygraphy and the lack of widespread acceptance of it in the scientific community, attempts to admit results of a polygraph examination will produce lengthy collateral litigation regarding the validity of the technique in general and the reliability of test results in particular cases. In each case, the party against whom the test results are introduced



can be expected to challenge the reliability of the results first before the court in an effort to prevent their admission and then, if they are admitted, before the jury. Because the validity of any particular polygraph test is dependent on a large number of variables—among them, the mental and physical suitability of the subject of the test, the competence and integrity of the examiner, the phrasing of the relevant questions, and the appropriateness of the control questions—the litigant has numerous potential avenues for attacking a test's reliability. The result in most cases is bound to be a time-consuming battle of experts who might differ not only on the validity of polygraphy in general, but also on the reliability of the particular polygraph test under consideration and the proper interpretation of the test results.

One state court has concluded that "the administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered. If a trial court were to adequately police the reliability of [polygraph] results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable." *State v. Grier*, 300 S.E.2d 351, 359 (N.C. 1983). Accord *Brown*, 783 F.2d at 1397; *United States v. Urquidez*, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973); *State v. Dean*, 307 N.W.2d 628, 650 (Wis. 1981); *People v. Barbara*, 255 N.W.2d 171, 196 (Mich. 1977). Protracted battles between "experts" over the methodology, meaning, and appropriateness of polygraph tests can occur even in jurisdictions with extensive experience in litigating over the admissibility of polygraphs. See *Commonwealth v.*

*Mendes*, 547 N.E.2d 35, 36-37 (Mass. 1989) (evidentiary hearing on polygraph results and motion for new examinations took four days of court time even though polygraph evidence had been permitted in state courts for fifteen years).

**4. Widespread judicial support for a prohibition on polygraph admissibility further supports the reasonableness of a per se rule**

Uncertainty about the reliability of polygraph testing is reflected in the refusal of most courts to admit polygraph evidence. In promulgating Rule 707, it was not arbitrary of the President to take into account the overwhelming views of federal and state civilian courts on whether polygraph results should be admissible into evidence. The general rule in most States is that the results of polygraph examinations are inadmissible in criminal trials, primarily because of the lack of adequate scientific support for their reliability.<sup>12</sup> By and large, these courts adhere to the

<sup>12</sup> See, e.g., *Porter*, 1997 WL 265202, at \*2; *In re Odell*, 672 A.2d 457, 459 (R.I. 1996) (per curiam); *People v. Sanchez*, 662 N.E.2d 1199, 1210 (Ill. 1996), cert. denied, 117 S. Ct. 392 (1996); *Contee v. United States*, 667 A.2d 103, 104 n.4 (D.C. 1995); *Commonwealth v. Sneeringer*, 668 A.2d 1167, 1174 (Pa. Super. Ct. 1995); *State v. Beard*, 461 S.E.2d 486, 492 (W. Va. 1995); *State v. Campbell*, 904 S.W.2d 608, 614-615 (Tenn. Crim. App. 1995); *Petition of Grimm*, 635 A.2d 456, 464 (N.H. 1993); *State v. Patterson*, 651 A.2d 362, 366 (Me. 1994); *Conner v. State*, 632 So.2d 1239, 1257 (Miss. 1993), cert. denied, 513 U.S. 927 (1994); *People v. Angelo*, 618 N.Y.S.2d 77, 78 (App. Div. 1994), aff'd, 666 N.E.2d 1333 (N.Y. 1996); *State v. Walker*, 493 N.W.2d 329, 335 (Neb. 1992); *State v. Hawkins*, 604 A.2d 489, 492 (Md. 1992); *Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991); *State v. Staat*, 811 P.2d 1261, 1262 (Mont. 1991); *Tennard v. State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990)

general rule even where the parties consent to admission of polygraph evidence, holding that "the reliability of the polygraph" is insufficient "to permit unconditional admission of the evidence." *Dean*, 307 N.W.2d at 653.<sup>13</sup>

In the federal arena, neither the United States Code nor the Federal Rules of Evidence has a specific provision concerning the admissibility of polygraph results. Under the "general acceptance" test for scientific testimony that prevailed under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), however, the federal appellate courts traditionally upheld the exclusion of polygraph evidence on the ground that the scientific theory of polygraph testing had not achieved general acceptance.<sup>14</sup> In *Daubert v. Merrell Dow*

(en banc) (per curiam), cert. denied, 501 U.S. 1259 (1991); *State v. Harnish*, 560 A.2d 5 (Me. 1989); *Haakanson v. State*, 760 P.2d 1030, 1034 (Alaska Ct. App. 1988); *Healy v. Healy*, 397 N.W.2d 71, 74 n.1 (N.D. 1986); *Johnson v. State*, 495 A.2d 1, 14 (Md. 1985), cert. denied, 474 U.S. 1093 (1986); *State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985), cert. denied, 476 U.S. 1141 (1986); *State v. Dornbusch*, 384 N.W.2d 682, 685 (S.D. 1986); *State v. Copeland*, 300 S.E.2d 63, 69 (S.C. 1982), cert. denied, 460 U.S. 1103 (1983); *People v. Anderson*, 637 P.2d 354, 358 (Colo. 1981) (en banc); *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. 1980); *State v. Catanese*, 368 So.2d 975, 981 (La. 1979); *State v. French*, 403 A.2d 424, 426 (N.H.), cert. denied, 444 U.S. 954 (1979); *State v. Steinmark*, 239 N.W.2d 495, 497 (Neb. 1976).

<sup>13</sup> See also, e.g., *State v. Okumura*, 894 P.2d 80, 94 (Haw. 1995); *Mendes*, 547 N.E.2d at 41; *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986); *People v. Anderson*, 637 P.2d 354, 362 (Colo. 1981) (en banc); *State v. Biddle*, 599 S.W.2d 182, 187 (Mo. 1980) (en banc); *Pulakis v. State*, 476 P.2d 474, 479 (Alaska 1970).

<sup>14</sup> *United States v. A&S Council Oil Co.*, 947 F.2d 1128, 1133-1134 (4th Cir. 1991); *Bennett v. City of Grand Prairie*, 883

*Pharmaceuticals*, 509 U.S. 579 (1993), the Court abandoned the *Frye* test and held that, under Federal Rule of Evidence 702, expert testimony may not be excluded solely because it is based on a scientific theory that has not yet achieved general acceptance; rather, the trial court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact." 509 U.S. at 592.<sup>15</sup> In the wake of *Daubert*, several courts of appeals have retreated from the categorical exclusion of polygraph evidence and have left the matter to trial courts.<sup>16</sup> No court of appeals, however, has concluded that polygraph testing is scientifically valid or that

F.2d 400, 405 & n.7 (5th Cir. 1989); *United States v. Miller*, 874 F.2d 1255, 1261 (9th Cir. 1989); *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987); *United States v. Murray*, 784 F.2d 188, 188 (6th Cir. 1986); *Brown*, 783 F.2d 1389 at 1394-1395. But see *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (en banc) (polygraph evidence not inadmissible *per se*); *Anderson v. United States*, 788 F.2d 517, 519 n.1 (8th Cir. 1986) (polygraph evidence admissible by stipulation).

<sup>15</sup> The *Daubert* Court provided a non-exclusive list of several factors that the trial court should consider in determining whether an expert's testimony rests on scientific knowledge: whether the theory or technique can be and has been tested, whether it has been subjected to peer review, whether the technique has a high known or potential rate of error, and whether the theory has attained general acceptance within the scientific community. 509 U.S. at 593-594.

<sup>16</sup> See *United States v. Cordoba*, 104 F.3d 225, 227-228 (9th Cir. 1997); *United States v. Williams*, 95 F.3d 723, 729 (8th Cir. 1996), cert. denied, 117 S. Ct. 750 (1997); *United States v. Kwong*, 69 F.3d 663, 667-669 (2d Cir. 1995), cert. denied, 116 S. Ct. 1343 (1996); *United States v. Sherlin*, 67 F.3d 1208, 1216-1217 (6th Cir. 1995), cert. denied, 116 S. Ct. 795 (1996); *United States v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995).



the results of a polygraph test were reliable enough to be admitted into evidence.<sup>17</sup>

**C. The Court Of Appeals Erred In Its Analysis Of The Per Se Bar On Polygraph Evidence**

1. In concluding that Rule 707 violates the Sixth Amendment right to present a defense, the court of appeals relied on this Court's statement in *Rock v. Arkansas*, 483 U.S. at 61, that a "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." Pet. App. 8a. The court of appeals then found no "significant constitutional difference" between the

<sup>17</sup> In a variety of out-of-court settings, the United States government does conduct and make limited use of the results of polygraph examinations. For example, the Department of Defense views polygraphs as a tool that enhances the interview and interrogation process, especially in providing essential information to resolve national security issues and criminal investigations. Similarly, the Federal Bureau of Investigation conducts polygraphs within the context of criminal investigations, but its general policy cautions that "[t]he polygraph is to be used selectively as an investigative aid and results considered within the context of a complete investigation." FBI, Manual of Investigative Operations and Guidelines § 13-22.2(2) (1987). The investigative benefits of the polygraph have been described as follows:

In the hands of a competent, well-trained and ethical examiner the polygraph can be a highly effective investigative tool. It can identify individuals who are withholding or distorting vital information, be one factor to eliminate possible suspects and even serve as a deterrent. Equally important, the psychological advantage created during the polygraph examination and interview process frequently results in confessions and admissions of guilt being obtained.

Murphy and Murphy, *supra*, at 2.

Court's holding that a State may not exclude a defendant's hypnotically refreshed testimony, and the issue presented here, which "concerns exclusion of evidence supporting the truthfulness of a defendant's testimony." *Id.* at 9a. If the court's interpretation of *Rock* were accepted, many categorical rules of exclusion found in the standard rules of evidence would be suspect. In fact, the court's reliance on *Rock* was misplaced.

*Rock* involved the defendant's constitutional right to testify and provide the jury with the defendant's own version of events. A bar of such evidence would seriously restrict the defendant's right to present a defense and would deprive the factfinder of highly relevant and probative information. At the same time, while hypnosis-induced recollections of the defendant may have an element of unreliability, the Court noted that the time-honored method for exposing weaknesses in testimony is cross-examination, 483 U.S. at 61, which may be coupled with expert testimony and cautionary instructions, *ibid.* In that setting, the Court held that a wholesale exclusion of the defendant's own testimony was not a proportionate means to respond to dangers to recollection posed by hypnosis.

In contrast to *Rock*, a defendant whose trial is governed by Rule 707 remains free to testify to his version of events. Rule 707 does not deprive the factfinder of the *substance* of the defendant's testimony; rather, it precludes only collateral polygraph evidence—to bolster or attack it. The validity of Rule 707 thus depends, not on a comparison to the result in *Rock*, but on an analysis of the interests underlying the *per se* prohibition on polygraph evidence. As we have discussed, the rule rationally serves valid inter-



ests in the fair and accurate adjudication of the ultimate issue. See pp. 18-33, *supra*. The court of appeals erred by failing to consider those interests.

2. The court of appeals also appeared to find Rule 707 arbitrary because other expert testimony is potentially admissible under Military Rule of Evidence 702, which permits a case-by-case inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*. The Court observed that under *Daubert*, "the trial judge [acts as] a gatekeeper, trusted with responsibility to decide if novel scientific evidence was sufficiently relevant and reliable to warrant admission." Pet. App. 9a. *Daubert*, however, was not decided under the Sixth Amendment, and it does not preclude the adoption of otherwise-reasonable per se rules to govern particular forms of expert testimony. Indeed, even under *Daubert*, courts might conclude that an accumulated body of knowledge and experience with a particular category of "science" justifies a categorical determination that the evidence is not admissible under the rubric of "scientific knowledge."

In any event, polygraph evidence has sufficient distinctive features that it is not arbitrary to conclude that, unlike other forms of scientific evidence, polygraph results should be categorically barred from evidence. Although an element of judgment is usually present with respect to other scientific evidence that is routinely admitted at trials, such as analyses of ballistics, fingerprints, handwriting, voiceprints, and blood, polygraph testing, "albeit based on a scientific theory, remains an art with unusual responsibility placed on the examiner." *United States v. Wilson*, 361 F. Supp. 510, 512 (D. Md. 1973). More importantly, polygraph evidence is different from other scientific evidence in that it effectively consists of "an opinion

regarding the ultimate issue before the jury, not just one issue in dispute." *Brown*, 783 F.2d at 1396. As the court explained in *United States v. Alexander*, 526 F.2d at 169, "[t]he role of the jury after a polygraphist has testified that the results of a polygraph examination show that the defendant's denial of participation in the crime was fabricated is much more circumscribed [than after the testimony of other scientific experts]. If the [polygraph] testimony is believed by the jury, a guilty verdict is usually mandated." The opposite would be true when a defendant supports his credibility by a polygraph examination. Finally, other types of scientific evidence are often indispensable to the resolution of particular factual issues. Polygraph evidence, on the other hand, is never indispensable in light of the traditional, time-tested tools available to juries for making credibility determinations. *Daubert* thus does not control this Court's analysis of the constitutional validity of the per se exclusion of polygraph evidence.

Notably, before *Daubert*, when the courts generally applied a per se bar against polygraph evidence under the *Frye* test, federal and state courts found no Sixth Amendment obstacle to such a rule. See, e.g., *Bashor v. Risley*, 730 F.2d 1228, 1238 (9th Cir.), cert. denied, 469 U.S. 838 (1984); *United States v. Gordon*, 688 F.2d 42, 44-45 (8th Cir. 1982); *Jackson v. Garrison*, 677 F.2d 371, 373 (4th Cir.), cert. denied, 454 U.S. 1036 (1981); *United States v. Glover*, 596 F.2d 857, 867 (9th Cir.), cert. denied, 444 U.S. 857, 860 (1979); *Connor v. Auger*, 595 F.2d 407, 411 (8th Cir.), cert. denied, 444 U.S. 851 (1979); *United States v. Lech*, 895 F. Supp. 582, 586 (S.D.N.Y. 1995); *People v. Price*, 821 P.2d 610, 663 (Cal. 1991), cert. denied, 506 U.S. 851 (1992);

*People v. Williams*, 333 N.W.2d 577, 580 (Mich. Ct. App. 1983); *State v. Conner*, 241 N.W.2d 447, 457-458 (Iowa 1976).<sup>18</sup> The fact remains, even after *Daubert*, that polygraph evidence has characteristics that justify specialized treatment under the rules of evidence. It is not arbitrary for appropriate authorities to conclude that the costs and dangers of admitting the evidence outweigh any limited contribution that polygraph evidence might make to the fair disposition of criminal trials.<sup>19</sup>

<sup>18</sup> But see *United States v. Williams*, 39 M.J. 555, 558 (A.C.M.R. 1994) ("We held under the facts of this case that appellant's Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard on these foundational matters [regarding polygraph reliability], and allows for the possibility of admitting polygraph evidence."), decision set aside, 43 M.J. 348, 354 (C.M.A. 1995) (holding polygraph inadmissible in this case because defendant did not take the stand), cert. denied, 116 S. Ct. 925 (1996).

<sup>19</sup> Nor is Rule 707 an irrational ban on a category of evidence akin to those invalidated in *Washington v. Texas*, 388 U.S. 14 (1987), or *Crane v. Kentucky*, 476 U.S. 683 (1986). In *Washington v. Texas*, the Court held that a State could not prohibit a defendant from introducing the testimony of a co-defendant in order to prevent perjury, because it was "arbitrary" to disqualify an entire category of defense witnesses on the presumption that they were "unworthy of belief." 388 U.S. at 22. In *Crane v. Kentucky*, the Court held that a State could not bar evidence of the circumstances of a confession on the theory that the evidence had no relevance once the confession had been ruled voluntary. The Court explained that the evidence may remain highly relevant to the credibility of the confession, and that there was no "rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." 476 U.S. at 691. As discussed in the text, there is a

## II. THE SIXTH AMENDMENT DOES NOT COMPEL ADMISSIBILITY OF POLYGRAPH RESULTS IN COURTS-MARTIAL

The constitutional theory embraced by the court of appeals not only conflicts with general principles of Sixth Amendment law applicable in state and federal civilian courts, it is particularly unwarranted and onerous in the military context. Thus, even if the court of appeals' application of the Sixth Amendment principles in the civilian context had merit, it would not justify invalidating a military rule of evidence, because respondent cannot meet his burden of demonstrating that a servicemember's need to introduce polygraph evidence in courts-martial overcomes the determination by the President to promulgate a *per se* rule prohibiting such evidence.

### A. Procedural Rules Adopted For Military Courts-Martial Are Entitled To Deference By This Court

The Constitution grants Congress the power "[t]o make rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, Cl. 14. This Court has recognized that this power "creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 19 (1957) (plurality opinion).

It is well established that certain Fifth and Sixth Amendment rights enjoyed by civilians are not appli-

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rational justification for treating polygraph evidence in a distinctive fashion.



cable to defendants in military proceedings. See, e.g., *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969) ("The Fifth Amendment specifically exempts 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger' from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury (emphasis supplied)."), overruled on other grounds, *Solorio v. United States*, 483 U.S. 435, 436 (1987); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (no right to Fifth or Sixth Amendment trial by jury in trials by military commission). Although persons tried by courts-martial cannot be denied the Fifth Amendment's guarantee of due process of law, this Court has determined that the tests for applying that right differ and that limitations on due process generally exist in the military context. See *Weiss v. United States*, 510 U.S. 163, 176-177 (1994); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

With respect to military trials, this Court has sanctioned the military's use of evidentiary and procedural rules that differ from those that prevail in civilian courts. See *O'Callahan v. Parker*, 395 U.S. 258 (1969) ("Substantially different rules of evidence and procedure apply in military trials."); *id.* at n.4 ("For example, in a court-martial, the access of the defense to compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent on the approval of the prosecution.".)<sup>20</sup>

<sup>20</sup> Military courts are not compelled to adhere to rules of evidence grounded only in the Supreme Court's supervisory powers over the administration of justice in the federal courts. See, e.g., *Burns v. Wilson*, 346 U.S. 137, 145 & n.12 (1953).

In assessing the need for a military court to adopt a certain rule or practice constitutionally mandated in civilian tribunals, this Court looks to "whether the factors militating in favor of [the practice] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-178 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). That test is highly deferential:

[T]he Constitution contemplates that Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline. Judicial deference thus is at its apogee when reviewing congressional decisionmaking in this area. Our deference extends to rules relating to the rights of servicemembers: Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.

*Weiss*, 510 U.S. at 177 (quotations and citations omitted). The court below erred in not giving the per se rule against polygraph admissibility the deference it deserved.

**B. Respondent's Interest in Introducing Polygraph Evidence Does Not Outweigh The Reasons For Establishing A Per Se Rule Prohibiting Such Evidence**

As this Court has recognized, "the military in important respects remains a 'specialized society separate from civilian society,' *Weiss*, 510 U.S. at 174 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)); see also *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996), whose essential function is "to fight or be



ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); see also *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). Military trials are necessary "to maintain discipline," but they are "merely incidental to an army's primary fighting function." *Quarles*, 350 U.S. at 17. "To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.* Thus, the introduction of procedural complexities into military trials is "a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf v. Henry*, 425 U.S. at 45-46.

The court of appeals' opinion does not reflect consideration of those factors, which have long informed this Court's assessment of rules designed for military trials. Nor does that decision accord the great deference properly due to the judgments of the political branches in this area. See, e.g., *Weiss*, 510 U.S. at 177; *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Invoking his powers under the Constitution, see Art. II, § 2, Cl. 1, and an express congressional delegation authorizing him to prescribe rules of evidence for courts-martial, see 10 U.S.C. 836(a), the President concluded that polygraph evidence is unnecessary for reliable credibility assessments, that its admission could confuse the trier of fact, and that case-by-case litigation about its admissibility would waste the time of servicemembers whose "primary function" (*Quarles*, 350 U.S. at 17) is the Nation's defense. Against those considerations is respondent's asser-

tion that the polygraph evidence would enhance his credibility in denying that he had used drugs since joining the Air Force. Yet prohibiting respondent from introducing the results of polygraph examinations neither lessens the prosecution's burden of proof nor limits respondent's opportunity to testify at a court-martial on any relevant topic. In light of the continuing disagreements among polygraph experts over the validity and reliability of polygraphs, the propensity of polygraph evidence to confuse the trier of fact, and the likelihood that the introduction of polygraph evidence would lead to lengthy disputes over the methodology and results of polygraph testing in a particular circumstance, respondent cannot carry his burden of demonstrating that "the factors militating in favor of [allowing polygraph evidence to be considered as evidence] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-178. Deference in formulating such an evidentiary rule is particularly appropriate where, as here, the scientific evidence on the validity of polygraphs is open to serious debate and polygraph test results may be manipulated. Thus, even if generally applicable Sixth Amendment principles were found not to justify a per se rule prohibiting polygraph evidence, the President and Congress may constitutionally establish such a rule in the context of courts-martial.

# CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

AIRMAN EDWARD G. SCHEFFER, RESPONDENT

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

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**QUESTION PRESENTED**

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgement of military defendants' right to present a defense.

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## OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 44 MJ 442 (1996), is located at Pet. for Cert. App. A. The opinion of the United States Air Force Court of Criminal Appeals, reported at 41 MJ 683 (AF Ct. Crim App 1995), is located at Pet. for Cert. App. B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 18 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”

The Sixth Amendment provides, in pertinent part:

“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .”

## STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted except where noted.<sup>1</sup> On 10 April 1992, three days after voluntarily provid-

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<sup>1</sup> Contrary to Petitioner's Brief at 7, the respondent was actually asked to provide a urine sample on 6 April 1992. J.A. 9. Though the respondent was unable to provide a sample that day because he urinated infrequently, this fact was no surprise to the OSI agents. During cross examination, the primary agent admitted that he knew as early as 10 March 1992 that the respondent indicated he only urinated infrequently. Record 128. He gave the sample the next day at approximately 8:00 a.m. Record 120. The respondent also voluntarily gave a urine sample on 10 March 1992 but no illegal drugs were detected. Record 127-128.

ing a urine sample to agents of the Air Force Office of Special Investigations (AFOSI), the Air Force requested and the respondent agreed to take an AFOSI polygraph exam and did so the same day. The examination was administered by a government certified OSI polygraph examiner. The examiner asked three relevant questions: (1) Since you've been in the AF, have you used any illegal drugs?; (2) Have you lied about any of the drug information you've given OSI?; and (3) Besides your parents, have you told anyone you're assisting OSI? Respondent answered "No" to each question. In the examiner's opinion, there was no deception indicated (NDI) in respondent's responses. (J.A. 12.)

After he testified at trial, respondent attempted to introduce the results of this polygraph examination to support his testimony that he did not knowingly use drugs. The military judge ruled that the respondent could not even attempt to lay a foundation to admit the polygraph (J.A. 28, 49) because of Mil. R. Evid. 707 which states:

- (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
- (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

On appeal, the Air Force Court of Criminal Appeals affirmed the respondent's conviction. The United States Court of Appeals for the Armed Forces reversed, holding Mil. R. Evid. 707 was unconstitutional to the extent it denied an accused the opportunity to admit exculpatory scientific evidence. "We do not now hold that polygraph examinations are

scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility." Pet. for Cert. App. A, p. 11a.

## SUMMARY OF ARGUMENT

The Court of Appeals for the Armed Forces' narrowly tailored holding—which "merely remov[ed] the obstacle of the *per se* rule [of Military Rule of Evidence 707] against admissibility" of an accused's exculpatory polygraph examination, offered by an accused who has testified and had his credibility attacked—should be affirmed.

I. Military Rule of Evidence 707 infringes upon a military accused's Sixth Amendment right to present a defense. It prevents an accused from laying a foundation for the admission of an exculpatory polygraph examination, even after his credibility has been attacked on cross-examination. The exclusion applies even if the evidence is both relevant and reliable under the particular facts of an accused's case.

The President's interest in barring unreliable evidence does not extend to a *per se* exclusion of evidence that has been shown to be reliable and relevant in an individual case. The United States has the burden of establishing the constitutionality of its *per se* exclusionary rule of evidence because "[w]holesale inadmissibility . . . is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all [testimony]." *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

II. In *United States v. Gipson*, 24 MJ 246 (CMA 1987), the United States Court of Appeals for the Armed Forces ruled that polygraph examinations may be admissible under Mil. R. Evid. 702, depending on the particular circumstances of the case, the competency of the examiner, the nature of the partic-



ular testing process employed, and other such factors. *Id.* at 253. For the next four years, most military cases in which polygraph evidence was an issue involved an accused's attempt to lay a foundation for the admissibility of an exculpatory polygraph. Mil. R. Evid. 707 was created in 1991 because the drafters believed that: court members would be misled by polygraph evidence that was likely to be shrouded "with an aura of near infallibility in all cases;" that court members would abandon their responsibility to ascertain the facts and adjudge guilt or innocence; that court members would become confused about the issues in a case; that the admission of polygraph evidence would result in a substantial waste of time and place a burden on the administration of justice; and that the reliability of polygraph evidence had not been sufficiently established. Manual for Courts-Martial, (MCM), United States, App. 22, p. A22-48 (1995 ed.)

Mil. R. Evid. 707 is arbitrary and invalid because polygraphs have been shown to be sufficiently reliable on the basis of current research and real life experience. Further, the Federal government, law enforcement agencies, and the Department of Defense in particular, rely on polygraph results daily in criminal investigations and matters of national security.

Research and experience have also shown that polygraph evidence does not mislead or confuse juries, nor usurp their role. Nor is the admission of polygraph evidence an unjustifiable burden on the administration of justice, particularly in respondent's case, where the polygraph examination was administered by a government certified polygraph examiner at the government's request and no conflicting polygraphs were involved. Further, the courts have allowed highly complex and technical evidence, in this case urinalysis evidence, to be routinely admitted against an accused.

Most jurisdictions in the United States do not have analogous *per se* exclusionary rules regarding polygraph evidence. In the

federal system, the majority of circuits allow an accused to lay a foundation for the admission of his own polygraph examination.

New Mexico has admitted polygraph evidence without significant restrictions for the past twenty two years. Its experience demonstrates that the reasons set forth for the creation of Mil.R.Evid. 707 are arbitrary and invalid.

III. Finally, Mil. R. Evid. 707 is not entitled to any special deference by this Honorable Court because of the special or "unique" needs of the Armed Forces. In creating Mil. R. Evid. 707, the drafter's analysis to the rule did not discuss any such concern prompting creation of the rule. No special needs of the military were at issue in respondent's case, where the government had two alternative ways of checking whether respondent had used drugs — the polygraph exam which it requested and the urinalysis test which it also requested. As a result of its rules of evidence, only the incriminating results could be admitted at respondent's court-martial.

Polygraph evidence is sufficiently reliable and relevant to be constitutionally required when offered by an accused in his defense, after he has testified and his credibility has been attacked. An evidentiary rule of exclusion that forever bars an accused from establishing the relevancy and reliability of such evidence under such circumstances is unconstitutional.

## ARGUMENT

### I. The *Per Se* Rule Of Exclusion Of Polygraph Evidence Directed By Military Rule Of Evidence 707 Violates Respondent's Sixth Amendment Right To Present A Defense

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." — Justice Potter Stewart<sup>2</sup>

<sup>2</sup> *Hawkins v. United States*, 358 U.S. 74, 81 (1958).

The United States argues that a *per se* rule of inadmissibility barring an entire category of scientific evidence, which numerous courts have found to be reliable and relevant, is constitutionally permissible. In *United States v. Posado*, 57 F.3d 428, 432 (5<sup>th</sup> Cir. 1995), the United States agreed that a *per se* rule against admitting polygraph evidence was no longer viable after *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Respondent believes the United States' position in *Posado* is the correct approach for a constitutional analysis.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

The combined effect of the Amendments is a requirement that criminal defendants be afforded "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). An accused must be given a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver*, 333 U.S. 257, 273 (1948); see also, *California v. Trombetta*, 467 U.S. 479, 485; (1984); *Washington v. Texas*, 388 U.S. 14 (1967).

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). As this Honorable Court noted in *Taylor*:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of the facts.

*Id.* at 408-409. Mil. R. Evid. 707 violates this fundamental right by automatically denying any accused an opportunity to even attempt to lay a foundation for the admission of exculpatory scientific evidence at his court-martial, either during findings or as mitigation evidence in sentencing, and to present that favorable evidence if the proper evidentiary foundation is established.<sup>3</sup>

The Supreme Court provided a framework for addressing this issue in *Rock*:

. . . restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify . . . . Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the

<sup>3</sup> It cannot be overemphasized that Mil. R. Evid. 707 bars polygraph evidence in all situations, even if an accused attempts to admit a polygraph examination as mitigation evidence during the sentencing phase of his death penalty case. In *Lankford v. Idaho*, without reaching the admissibility of polygraph evidence in capital sentencing hearings, this Court acknowledged constitutional principles and persuasive argument of such evidence in the context of a capital case. 500 U.S. 110, 124 n.19 (1991) (noting that had petitioner been adequately notified of the capital character of his sentencing judge to consider polygraph evidence in mitigation based

*absence of clear evidence by the State repudiating [its] validity . . . .*

483 U.S. at 55-56.

In *Rock*, this Court reversed a state court opinion that relied on a *per se* exclusionary rule without regard to the rights of the defendant. The defendant was charged with manslaughter based upon the shooting death of her husband. Because the defendant could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. She was, in fact, hypnotized twice but did not relate any new information during either of the sessions. After the hypnosis, however, she remembered details of the shooting that were corroborated by other evidence in the case.

At the time of her trial, Arkansas had a *per se* exclusionary rule that did not allow the trial court to consider whether post-hypnosis testimony was admissible in a particular case. Acting on the government's pretrial motion, the trial court issued an order limiting the defendant's testimony to matters remembered and stated to the examiner prior to hypnosis.

In reviewing the scientific validity of hypnosis, this Court noted that ". . . there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled." 483 U.S. at 59 (cita-

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on Supreme Court precedent) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978) which stated, ". . . a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable. . . .") Mil. R. Evid. 707 would exclude polygraph evidence by a military accused in such a case.

tion and footnote omitted). Moreover, the Court stated that "[w]e are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." 483 U.S. at 61. Nonetheless, the Court declared:

Arkansas, however, has not justified the exclusion of all of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring *unreliable evidence does not extend to per se exclusions that may be reliable in an individual case*. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections.

483 U.S. at 61 (emphasis added).

Petitioner attempts to distinguish *Rock*, as do various courts (see Brief of the State of Connecticut and 27 States as Amici Curiae, 10 n.6), by arguing that *Rock* dealt with an accused's right to testify, not a defendant's right to present witnesses in his defense. Brief for Petitioner, at 35. Such an argument, however, ignores the fact that an accused has a fundamental, constitutional right to present a defense—to call witnesses—not merely a right to testify. *Chambers*, 410 U.S. at 302. Both rights are "fundamental." The Sixth Amendment, on its face, is silent about an accused's right to testify in his own behalf. At the time the Constitution was adopted, the common law disqualification of parties as witnesses, and the disqualification of a defendant to testify in his own behalf, had existed for years. An accused, though, was allowed to call witnesses in his behalf. *Ferguson v. Georgia*, 365 U.S. 570, 573 (1961). Historically, the right to call witnesses by an accused can be



said to be more fundamental than the right to testify. Respondent does not believe the *Rock* decision would have been different if it involved the hypnotically refreshed testimony of a witness who, after hypnosis, recalled that he, and not the accused, committed the crime and was willing to so testify.

The holding of this Court in *Rock* should apply with at least equal force to polygraph evidence, which is less controversial than hypnotically induced testimony. Although the current "legal view of its appropriate role is unsettled," blanket denial of a defendant's opportunity to lay a foundation for the admissibility of polygraph evidence is not justified. As with posthypnosis testimony, the United States attempts to bar defense exculpatory evidence "without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced." *Id.* at 56. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions of evidence that may be reliable in an individual case in the absence of clear evidence by the State to the contrary. *Id.* at 61.

A few courts have held it is not unconstitutional to bar polygraph evidence that is favorable to the defense because they believe polygraph evidence has not been "generally accepted" as reliable. See, e.g. *United States v. Alexander*, 526 F.2d 161, 166 (8<sup>th</sup> Cir. 1975); *People v. Price*, 1 Cal.4<sup>th</sup> 324, 821 P.2d 610, 663 (1991); *State v. Black*, 109 Wash. 2d 336, 346-47, 745 P.2d 12 (1987). These decisions overlook that polygraph evidence is sufficiently reliable in particular cases, and can be very critical to a defendant's case. "In a given case, this Court's decisions may require that exculpatory evidence be admitted into evidence despite state evidentiary rules to the contrary." *Israel v. McMorris*, 455 U.S. 967 (1982) (Rehnquist, C.J., O'Connor, J., dissenting to denial of *certiorari*).

In *Washington v. Texas*, the defendant was convicted of murder with malice. At trial, he attempted to call Charles

Fuller, a co-participant in the same murder. Fuller would have testified that the defendant tried to persuade him to leave, and that the defendant ran away before Fuller shot the victim. At trial, two Texas statutes prohibited Fuller, a co-participant, from testifying for the defendant. This Honorable Court held that the defendant was denied his right to compulsory process because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23.

The teaching of *Chambers v. Mississippi*, is that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. In *Chambers*, the defendant was convicted of murdering a policeman. After his arrest, but prior to trial, another man, McDonald, confessed to the murder in a sworn, written statement and in unsworn, oral statements to others on three separate occasions. McDonald was called as a defense witness, but repudiated his sworn statement. The defendant was unable to present a defense by cross-examining him due to a state rule preventing a party from impeaching its own witness. McDonald's oral confessions to others were excluded from evidence as inadmissible hearsay. This Court held that although the defendant was able to "chip . . . away at the fringes" of McDonald's story by the admission of other evidence, his defense was "far less persuasive than it might have been had he been given an opportunity" to present a complete defense. 410 U.S. at 294. This Court held that the combination of the two evidentiary rules as applied in *Chambers* denied the defendant his right to a fundamentally fair trial. 410 U.S. at 303. See also *Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony about the circumstances of a confession deprived the defendant of his right to present a defense); *Davis v. Alaska*, 415 U.S. 308 (1974) (petitioner's

right of confrontation is paramount to the State's rule prohibiting cross-examination of government witness concerning his probationary status as a juvenile delinquent).

In *Michigan v. Lucas*, 500 U.S. 145 (1991), the defendant was tried for the rape of his ex-girlfriend. Michigan had a "rape-shield" law designed to protect victims of rape from harassing or irrelevant questions concerning their past sexual behavior. An exception to this rule allowed admission of evidence that was materially relevant, such as the defendant's past sexual conduct with the victim, provided that he followed certain notice procedures. The defendant did not give the required notice but at trial sought to admit the evidence of his past sexual conduct with the victim. The trial court refused to allow the evidence and the Michigan Court of Appeals reversed, finding the exclusion based on a notice requirement *per se* unconstitutional. This Court held that the notice requirement can justify the exclusion of such evidence, in some cases. It did not decide whether the preclusion in that case was proper. Contrary to petitioner's argument, (Brief for Petitioner, at 15) the statutory notice requirement did not prohibit exculpatory evidence from being admitted by the defense but only placed a procedural prerequisite accelerating the timing of the disclosure to the prosecution. The rule did not *per se*, under all circumstances, exclude the evidence. See *Williams v. Florida*, 399 U.S. 78 (1970) (notice requirement to present alibi defense).

Respondent recognizes that an accused's right to present relevant evidence is not absolute. As in *Lucas*, this Court has noted that procedural and evidentiary rules control the presentation of evidence. *Rock*, 483 U.S. at 55 n.11; *Washington v. Texas*, 388 U.S. at 23, n.21; *Montana v. Egelhoff*, \_\_ U.S. \_\_, 116 S.Ct. 2013, 2022 (1996). This Court has indicated that, in any particular case, evidence may be excluded "through the application of evidentiary rules that themselves serve the inter-

ests of fairness and reliability—even if the defendant would prefer to see the evidence admitted," *Crane*, 476 U.S. at 690. This rationale, however, should not extend to *per se* exclusions of an entire class of exculpatory evidence.

Petitioner argues Mil. R. Evid. 707 does not abridge the Sixth Amendment by analogizing it to several standard rules of evidence that prohibit the admission of relevant, exculpatory evidence, such as Fed. R. Evid. 403, 404(b), 501, 702, 704, and 802. Brief for Petitioner, at 15-17. However, such rules do not set up *per se* bars to the introduction of the underlying evidence in all cases. For example, the hearsay rules do not exclude the underlying evidence when otherwise admissible and include a number of exceptions that allow consideration of hearsay evidence. Similarly, Fed. R. Evid. 403 excludes unduly prejudicial evidence on a case by case basis. Fed. R. Evid. 404(b) does not, as petitioner claims, *per se*, exclude evidence of other crimes or wrongs. The rule, instead, permits such evidence to prove among other things, bias, motive, intent, preparation, plan, knowledge, identity, and opportunity. Further, Fed. R. Evid. 405(b) allows specific instances of conduct to prove character when a trait of character is an essential element of an offense or defense. Though evidentiary rules may sometimes exclude relevant, exculpatory evidence, there are limits that prevent the exclusion of entire categories of evidence for all time. *Montana v. Egelhoff*, \_\_ U.S. \_\_, 116 S.Ct. at 2017 (1996).

The constitutional infirmity of Mil. R. Evid. 707 is vividly demonstrated by its unfair application in the respondent's trial. Here, the government itself asked Airman Scheffer to consent to a polygraph examination in order for him to continue operating as their undercover source. Pet. for Cert. App. 2a; J.A. 10. He agreed to do so and on 10 April 1992, three days after consenting to the OSI agent's request to take a urinalysis test, passed the OSI's polygraph examination. J.A. 11-12. All this

took place one month before he was accused of illegally using methamphetamine, based on the results of his urinalysis. J.A. 2. Though the prosecution had two disparate pieces of evidence on the issue of knowing drug use, they offered only those results inculcating Airman Scheffer. To further exacerbate this unfairness, the prosecution opposed the defense's attempt to lay a foundation to admit his exculpatory polygraph. After the military judge refused to admit the exculpatory evidence, applying Mil. R. Evid. 707's *per se* ban, the prosecution presented its case-in-chief that included more than three hours of testimony by their drug testing expert. Record 152-199. Airman Scheffer testified, denying he knowingly ingested methamphetamine. J.A. 34. He was then cross-examined by the trial counsel. J.A. 35-47.

After the presentation of evidence, the military judge instructed the members, "[u]se of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary." Record 334. During closing argument, the trial counsel asserted this permissive inference in trying to persuade the members to convict Airman Scheffer. J.A. 54-55. Knowing full well respondent passed his polygraph, trial counsel vigorously and repeatedly argued Airman Scheffer was a "liar," had no "credibility," and should not be believed. J.A. 57, 61-62.<sup>4</sup> "The only way you can find him not guilty of these offenses, is if you believe his story." J.A. 62.

Airman Scheffer was not given a chance to further explain why the court members should believe his story. Respondent's polygraph examination was relevant, reliable, exculpatory evidence that would have assisted the court members in making an informed decision as to whether he was worthy of belief.

<sup>4</sup> Trial counsel summed up his argument by declaring "[t]he only way you can find him not guilty of these offenses, is if you believe his story. If you are to believe that, this time he is telling the truth. Maybe he lied in the past. But, he's telling us the truth now. That's the only way." J.A. 62.

Mil. R. Evid. 707's *per se* ban on the admission of the respondent's polygraph results violated his right to present a defense under the 6<sup>th</sup> Amendment.

## II. The Reasons Set Forth For The Creation Of Military Rule of Evidence 707 Are Neither Reasonable Nor Valid And Do Not Overcome A Defendant's Sixth Amendment Right To Present A Defense

Mil. R. Evid. 707 was promulgated in 1991. Prior to its adoption, the then named Court of Military Appeals decided the case of *United States v. Gipson*, 24 MJ 246 (CMA 1987). The Court held that polygraphs could be admissible under Mil. R. Evid. 702, assuming a proper foundation had been laid by the proponent. During the next four years, military appellate courts decided approximately nine cases involving the admissibility of polygraph evidence. Overwhelmingly, the cases dealt with an accused attempting to lay a foundation for the admission of an exculpatory polygraph.<sup>5</sup> These cases are strong empirical evidence that Mil. R. Evid. 707 was created to prevent what was the clear trend involving the admission of polygraph evidence in courts-martial after *Gipson*—an accused's attempt to lay a foundation for the admission of exculpatory polygraph evidence.

The drafter's analysis to Mil. R. Evid. 707 sets forth five reasons for the *per se* exclusion of polygraph evidence:

<sup>5</sup> *Gipson*, *supra*; *United States v. Howard*, 24 MJ 897 (CGCMR 1987), *pet. denied*, 26 MJ 231 (CMA 1988) (defense evidence); *United States v. Abeyta*, 25 MJ 97 (CMA 1987), *cert. denied*, 484 U.S. 1027 (1988) (defense evidence); *United States v. Berg*, 32 MJ 141 (CMA 1991) (defense evidence); *United States v. Jensen*, 25 MJ 284 (CMA 1987) (defense evidence); *United States v. Pope*, 30 MJ 1188 (CMA 1990), *pet. denied*, 32 MJ 249 (CMA 1990) (defense evidence); *United States v. Blanchard*, ACM 28428, (ACMR 1991) (defense evidence); *United v. Rodriguez*, 37 MJ 448 (CMA 1993) (gov't evidence); *United States v. Baldwin*, 25 MJ 54 (CMA 1987) (gov't evidence).



... There is real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility . . . ." To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted." . . . There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs . . . . Polygraph evidence can also result in a substantial waste of time . . . [and] places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system.

MCM, United States, 1984, App. 22, p. A22-48, (citations omitted). None of these reasons justify a *per se* rule excluding polygraph evidence in all cases.

#### **A. The Reliability Of Polygraphs Has Been Sufficiently Shown In The Scientific Community**

In 1923, James Frye was accused of murdering a doctor. Later, Dr. William Marston placed a blood pressure cuff around one arm and measured Frye's systolic blood pressure at different intervals in response to a series of questions. Marston concluded that Frye answered truthfully when he denied killing the doctor. S. Abrams, *The Complete Polygraph Handbook*, p. 3 (1989). The court refused to admit this evi-

dence, finding the procedure involved was not generally accepted in the scientific community in 1923. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Despite the resulting stagnant judicial approach to polygraph evidence, the science of the polygraph testing advanced steadily through the years. Today, the instrumentation, methodology, training, and quality control associated with polygraph testing have advanced to a point that would be unrecognizable to the *Frye* court.

Though the petitioner attempts to persuade this Honorable Court that polygraph testing is unreliable (Brief for Petitioner, at 18-26), this broad declaration fails to withstand careful scrutiny. The psychophysiological detection of deception,<sup>6</sup> commonly called the polygraph examination, has evolved over a period of more than seventy years to become a valid and reliable means of resolving questions of deception.

Contrary to petitioner's argument, leading practitioners in the field of polygraph fiercely support its use, utility and reliability, particularly the Department of Defense. See generally AFOSI Pamphlet 71-125, *The Air Force Commanders' Guide to the USAF Polygraph Program*, April 1997 (B. Stern). The Department of Defense (DoD) has been using the polygraph for almost half a century and views the polygraph as "... clearly one of our most effective investigative tools."<sup>7</sup> Within DoD the

<sup>6</sup> The term "psychophysiological detection of deception" or PDD has been part of scientific literature since 1921. However, the term "polygraph" was generally accepted. W. Yankee, *A Case for Forensic Psychophysiology and Other Changes in Terminology*, undated. With the scientific, technological and other recent advancements that have occurred with the polygraph, including use of computerized polygraph instrumentation, scoring algorithms, formal quality assurance and continuing education programs, PDD is a more accurate and descriptive term. AFOSI Pamphlet 71-125, *The Air Force Commanders' Guide to the USAF Polygraph Program*, April 1997 (B. Stern).

<sup>7</sup> Fiscal Year 1996 DoD Polygraph Program Annual Polygraph Report to Congress, Office of the Assistant Secretary of Defense (OASD) for Command, Control, Communications, and Intelligence (C3I), Executive Summary, p. 8.

polygraph is used in criminal and counterintelligence investigations, foreign intelligence and counterintelligence operations, exculpation requests, and as a condition for granting access to certain sensitive positions, information or facilities. *Ibid.*

A polygraph examination consists of four distinct phases: (1) pretest, (2) in-test, (3) test-data-analysis and (4) post-test. During the pretest phase, the examiner lays the foundation for the entire examination and comprehensively reviews, with the examinee, each question to be asked during the in-test phase of the examination.<sup>8</sup> When questions are posed during the in-test phase, the examinee will subjectively analyze each question and attach a certain degree of significance to it. The examinee will then cognitively process that information further and consciously decide whether to answer the question truthfully. While the examinee is going through this evaluation process, there is a corresponding involuntary physiological change brought about by the sympathetic branch of the body's autonomic nervous system.<sup>9</sup> This is recorded by the physiological sensors of the polygraph instrument and subsequently analyzed during the test-data-analysis phase. W. Yankee, *supra*, at 1; AFOSI Pam 71-125, *supra*, p. 12, 25.

Typically, there are three types of physiological recording sensors used during a polygraph examination: (1) pneumograph, (2) electrodermal, and a (3) cardiovascular sensor. The pneumograph sensor records respiration and consists of two rubber tubes placed across an examinee's upper thoracic cavity and diaphragm.<sup>10</sup> The electrodermal sensor records sweat

<sup>8</sup> See Department of Defense Polygraph Institute (DoDPI), Forensic Sciences Course 501, *Pretest Interview Student Handout*, Nov 94.

<sup>9</sup> Petitioner's Brief at 3 incorrectly refers to the autonomic nervous system as the "autonomous" nervous system.

<sup>10</sup> Petitioner's Brief at 3 suggests that a standard polygraph examination utilizes only one pneumograph sensor. The DoDPI teaches examiners to use two pneumograph tubes because it is well established that the intercostal muscles (located in the chest or thoracic cavity) respond to different nerve

gland activity (palmar sweating) through two finger plates placed on the underside of an examinee's hand. The cardiovascular sensor records mean arterial blood pressure, heart rate, blood volume changes and other associated cardiovascular activity by using a standard medical blood pressure cuff (typically on the upper arm but can be placed elsewhere on the body). D. Weinstein, *Anatomy and Physiology for the Forensic Psychophysiology*, June 1994 (Revised).

There are three general types of questions used in polygraph examinations. The first type is called "relevant questions," which pertain directly to the issue under investigation (e.g., "Did you shoot Sharon?").<sup>11</sup> Relevant questions are used to explore direct or indirect involvement, connection to evidence, or one's guilty knowledge. The second type, "irrelevant questions" (also known as "norm" or "neutral" questions), is non-emotion invoking in nature (e.g., "Are the lights on in this room?"). These questions are used to absorb orientating responses to the onset of questioning, general nervous tension and assist in establishing an examinee's physiological baseline. Finally, "comparison questions," (also known as "probable lie" or "control" questions) are used. These questions explore matters similar in nature to the issue under investigation but are differentiated from relevant questions by a prefatory clause related to time, place or category (e.g., "Prior to 1997, did you ever even think about hurting someone?"). *Ibid.*

innervation than does the diaphragm. D. Weinstein, *Anatomy and Physiology for the Forensic Psychophysiology*, June 1994 (Revised).

<sup>11</sup> Petitioner's Brief at 3 refers to one of the three broad categories of questions asked during a polygraph examination as "direct" questions when, in fact, questions pertaining directly to the issue under investigation are known throughout the research and polygraph community as "relevant" questions. *Test Question Construction Student Handout*, DoDPI, July 1995.

Comparison question tests (CQT) are the most common testing format used in law enforcement<sup>12</sup> and are widely applied in the national security system of the United States.<sup>13</sup> The premise behind the CQT technique is that the guilty and innocent examinee will differ in their physiological reactions to relevant and comparison questions. Innocent examinees are expected to produce greater physiological arousal to comparison questions than to relevant questions. This is because innocent examinees are *certain* of the veracity of their responses to the relevant questions and will either lie, not fully disclose, or be less certain about the veracity of their responses to the comparison questions. The deceptive individual is expected to show greater physiological arousal to the relevant questions. *Ibid.*<sup>14</sup>

Several recognized theories explain the causes of the physiological responses elicited when an examinee is found to be lying or deceptive.<sup>15</sup> The most generally accepted theory is that a deceptive person's response is a result of the fear of detection. Fear is an emotion that results in physiological arousal. The degree of arousal is proportional to the fear experienced by the examinee.

An examiner renders one of four diagnostic opinions during the test-data-analysis phase: (1) No Deception Indicated, (2) Deception Indicated, (3) Inconclusive, and (4) No Opinion. AFOSI Pam. 71-125, *supra*, p. 20. The original examiner's

<sup>12</sup> G. Barland, *Standards for the Admissibility of Polygraph Evidence*, 16 U. West. L.A. L. Rev. 37, 46 (1984).

<sup>13</sup> C. Honts, D. Raskin, and J. Kircher, *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 Journal of Applied Psychology, 79 (1994).

<sup>14</sup> See also J. Reid and F. Inbau, *Truth and Deception: The Polygraph (Lie Detector Technique)*, at 28 (1973).

<sup>15</sup> G. Barland, *Theories of Detection of Deception Handout*, DoDPI, (1982). Dr. Barland's handout is a comprehensive evaluation of the predominate theories surrounding the detection of deception, two of the most accepted theories, fear of detection and psychological set theory, are addressed in this Brief.

opinion, at least within the Air Force and most federal government agencies, can only be authenticated after one, and often two, independent layers of quality control review.<sup>16</sup>

During the post-test phase, the examiner advises the examinee of his or her diagnostic opinion. If no deception is indicated, the examination is complete. If deception is indicated the examiner will often attempt to ascertain the reason for the deceptive results. If the results are "inconclusive," additional testing may be conducted until the matter under investigation is resolved. If for any reason the examination is stopped and a conclusive diagnostic opinion cannot be made, the examiner will render a "no opinion" decision. AFOSI Pam. 71-125, *supra*, at 20-21.

Numerous studies have been conducted on polygraph testing.<sup>17</sup> Current research demonstrates that polygraph testing is scientifically reliable and represents a valid measure of an examinee's deceptiveness or lack thereof. Research into the validity of polygraph examinations essentially falls into 2 types of experimentation—laboratory and field studies.<sup>18</sup>

<sup>16</sup> The Air Force Office of Special Investigations is the executive agency for the Air Force Polygraph Program. Within the Air Force, there are two layers of quality control review. The first review is conducted at the operational field level by the examiner's field supervisor. The second and final quality control review is accomplished at the Air Force Polygraph Program Office. AFOSI Instruction 71-117, *Specialized Investigative Services*, 17 December 1996.

<sup>17</sup> See generally, N. Ansley, *Compendium on Polygraph Validity*, 12(2) Polygraph 53-61 (1983); N. Ansley, *The Validity and Reliability of Polygraph Decisions in Real Cases*, 19(3) Polygraph 169-181 (1990).

<sup>18</sup> Since lab studies use a mock crime to assess whether the examinees are being deceptive, such studies have the advantage of knowing the "ground truth" of which examinee "committed" the crime in question. However, such examinees are not facing the real life prospect of criminal prosecution and, therefore, do not present the same degree of physiological stimulation as a real-life suspect. As for field studies, "ground truth" may be difficult to ascertain but the examinees display real physiological reactions. S. Abrams, *The Complete Polygraph Handbook*, p. 181-182 (1989).



Most researchers estimate that the polygraph procedure accurately assesses deception or a lack thereof over 90% of the time.<sup>19</sup> Though petitioner's brief relies upon the work of Dr. Lykken to criticize the field of polygraphy in general, Lykken, in fact, *promotes* a particular type of polygraph technique, the guilty knowledge test (GKT). Dr. Lykken firmly believes the GKT technique will accurately determine whether an examinee possesses knowledge of the particulars of a crime only possessed by a guilty person.<sup>20</sup>

Petitioner also cites the 14 year old Office of Technology Assessment (OTA) Study as a basis to conclude that polygraph testing today is invalid and unreliable. The study responded to a request from Congress to review and evaluate then current scientific evidence about the validity of polygraph testing. U.S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum* (OTA-TM-H-15, Nov. 1983) (OTA Study). The study, although initially touted as a comprehensive review, was subsequently criticized for use of an improper statistic (the *lambda* statistic) and for treating "inconclusive" test results as errors.<sup>21</sup> The OTA Study substantially undervalued the accuracy of polygraph testing, particularly in its review of various laboratory studies. McCauley and Forman, *A Review of the Office of Technology Assessment Report on Polygraph Validity*, Basic and Applied Social Psychology, 9(2), p. 74, 79 (1988). As such, the petitioner's reliance upon the conclusion of the OTA Study—that poly-

<sup>19</sup> J. Matte, *Forensic Psychophysiology using the Polygraph*, Pp.121-129 (1996). The author provides an exhaustive survey of the numerous studies and reviews of such studies concerning the various types of polygraph techniques.

<sup>20</sup> D. Lykken, *Detection of Guilty Knowledge, A Comment on Forman and McCauley*, 73 J. App. Psych. 303-304 (1988).

<sup>21</sup> An "inconclusive" opinion simply means that additional testing is required to render a conclusive diagnostic opinion. Therefore, it is not an error for the examiner to render an inconclusive opinion. *Ibid.*

graph tests in criminal investigations have significant error rates—is undermined by the study's suspect statistic.

Petitioner cites a few judicial opinions that attach significance to the fact that a polygraph test is not replicable. Yet, many types of scientific evidence encounter no judicial resistance simply because a test result is not replicable. For example, the science of handwriting analysis typically involves the comparison of a questioned document with a large number of exemplars. P. Giannelli & E. Imwinkelried, *Scientific Evidence*, §21-2, at 141, 148 (2 ed. 1993). This is essential for two reasons: (1) no person will write a word the same way twice; and (2) if the suspect attempts to disguise his/her true writing style, a large number of exemplars will make such an effort at deception easier to detect. The exemplars are not replicated. Like handwriting analysis, polygraph examinations involve comparisons. It is the differential physiological responses between relevant and comparison questions that a trained examiner is looking for in order to assess an examinee's credibility. As such, truly replicable tests are not necessary to reach an accurate assessment.

Petitioner's argument is further undermined when one considers the universal acceptance of handwriting analysis in courts of law today. *Ibid.* at 179. Despite research that details high error rates—some as high as 87%—among questioned document examiners, courts continue to admit such evidence. *Ibid.* at 180.<sup>22</sup>

Polygraphs have also been compared to other types of evidence. A laboratory study was conducted in 1977 to assess the validity of the CQT technique in comparison to fingerprint identification, handwriting analysis, and eyewitness identifica-

<sup>22</sup> The referenced study by Professor Denbeaux reported accuracy rates as low as 13%. More recent studies call into question whether the accuracy rate is this low. P. Giannelli & E. Imwinkelried, *Scientific Evidence*, §21-7(A), at 40 (2 ed. 1996 Cumulative Supplement).

tion.<sup>23</sup> The study found the CQT polygraph technique was best able to correctly resolve a mock crime. When the data included "inconclusive" opinions, the polygraph produced a correct result 90% of the time. Polygraph testing was accurate 95% of the time when "inconclusive" opinions were excluded from the data. *Ibid.* at 598. Fingerprint identification, handwriting analysis, and eyewitness identification are all used in trials.<sup>24</sup> Yet, under Mil. R. Evid. 707, polygraph evidence is excluded without exception.

Petitioner expresses a belief that a "highly motivated subject" might employ countermeasures to thwart the examination process. However, research indicates the spontaneous use of countermeasures is ineffective against the CQT technique. C. Honts, D. Raskin, & J. Kircher, *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 J. A.Psych. 292 (1994). Additionally, the U.S. Government has spent considerable funds to develop countermeasure detectors. *Ibid.* at 252.<sup>25</sup> Any possible problem with countermeasures in a given test is best explored through the time-honored mechanism of cross-examination. Cf. *Rock*, 483 U.S. at 61.

Other concerns courts have with polygraphs have been resolved through training requirements. The DoD Polygraph Institute<sup>26</sup> (DoDPI) is generally considered to be the best train-

<sup>23</sup> J. Widacki & F. Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 J. Forensic Sci. 596-601 (1978).

<sup>24</sup> By way of contrast, see *State v. Klawitter*, 518 N.W.2d 577 (1994), wherein the Supreme Court of Minnesota had no difficulty admitting prosecution evidence concerning the "horizontal gaze nystagmus" test despite testimony revealing significant criticisms of the technique and subjectivity of the eye test portion of the protocol.

<sup>25</sup> Ongoing research into countermeasures by the Department of Defense is reported annually to Congress.

<sup>26</sup> The DoDPI is a federally funded institution, under the authority, direction and control of the Defense Investigative Service, that provides introductory and continuing education courses in forensic psychophysiology.

ing facility for polygraph examiners in the United States.<sup>27</sup> All Air Force polygraph examiners (including respondent's examiner) must meet stringent qualifications.<sup>28</sup> Additionally, AFOSI examiners must complete the DoDPI basic courses in forensic psychophysiology (14 weeks in length, covering 560 hours of in residence instruction), must conduct approximately 50 polygraph examinations during initial training, and serve a minimum six month internship, under the supervision of a certified examiner. Examiners must also receive 80 hours of continuing education every two years. With such stringent training requirements and testing protocols in place within the DoD, petitioner's claim that polygraph examiners inject a "high degree of subjectivity into the examination" is without merit. Brief for Petitioner at 23.

Respondent was administered a polygraph examination by a fully certified and experienced DoD examiner using standard rules of test protocol. The examination, like all others in the Air Force, was authenticated by quality control supervisors conducting "blind" reviews, both at the field and headquarters polygraph program office levels before it was finalized with a No Deception Indicated assessment.

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Its purpose is twofold: (1) to qualify DoD and non-DoD federal personnel for careers as forensic psychophysiology, (2) to provide continuous research in forensic psychophysiology and credibility assessment methods. The Institute's *Basic Courses in Forensic Psychophysiology* is the only program known to base its curriculum on forensic psychophysiology and conceptual, abstract, and applied knowledge that meets the requirements of a master's degree-level of study. AFOSI Pam. 71-125, *supra*, at 18.

<sup>27</sup> C. Honts & M. Perry, *Polygraph Admissibility Changes and Challenges*, 16 Law & Human Behavior 357, 370 (1992).

<sup>28</sup> DoD Directive 5210.48 states that every polygraph examiner candidate must be a U.S. citizen; be 25 years old; have graduated from an accredited 4-year college (or equivalent) plus have 2 years as an investigator with a U.S. government or other law enforcement agency; be of high moral character and sound emotional temperament, based upon a background investigation; and, finally, be judged suitable for the position after successfully taking a polygraph examination.

Though petitioner argues that polygraph testing should be the subject of an absolute exclusionary rule, such an argument fails to acknowledge the validity of such testing, especially within the United States Government itself.<sup>29</sup> As reported to Congress in fiscal year 1996, the DoD conducted 12,548 examinations, with 21.5% occurring during a criminal investigation and another 4.6% occurring at the specific request of a criminal suspect for exculpation purposes. *Ibid.* at 1. These annual reports reflect a tremendous reliance upon polygraph testing to resolve issues ranging from a small bank theft to espionage allegations affecting national security. See also *Cooke v. Orser*, 12 MJ 335 (CMA 1982).

The *per se* bar of Mil. R. Evid. 707 ignores the voluminous research showing polygraph testing is accurate and reliable when used by highly trained examiners employing well-accepted techniques, such as CQT in criminal investigations. A critical analysis of the literature reveals discrete and differing opinions about the accuracy of polygraph testing, depending upon the type of technique employed and qualifications of the examiners conducting the various tests. See generally, J. Matte, *Forensic Psychophysiology Using the Polygraph*, Pp. 102-155 (1996). Lumping the techniques and research together to advance a broad conclusion about the accuracy of polygraph testing is inappropriate and reveals the fundamental flaw behind Mil. R. Evid. 707's blanket ban of polygraphs, a

<sup>29</sup> The Department of Justice continues to support the use of polygraph examinations as an "investigatory tool" while "oppos[ing] all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test." Government attorneys are instructed to "refrain" from seeking admission of favorable examinations, yet such attorneys are free to offer any voluntary admissions or confessions obtained by use of this polygraph. Department of Justice Policy 9-13.310. Mil. R. Evid. 707 also allows admission of any otherwise admissible statements or confessions obtained in the course of a polygraph examination against an accused.

ban so absolute it even bars the mention of the word "polygraph" in a courts-martial.

This Honorable Court has not looked favorably upon *per se* exclusionary rules involving a concern that evidence may be unreliable. In *Manson v. Brathwaite*, 432 U.S. 98 (1977), this Court was presented with the "issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability [in this case], of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary." 432 U.S. at 99. The defendant argued that "identification evidence is so convincing to the jury that sweeping exclusionary rules are required. Fairness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule has an established constitutional predicate." *Id.* at 111. The Court rejected a *per se* rule, stating that such a rule "goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." *Id.* at 112. Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm." *Id.* at 113. "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias." *Id.* at 113 n.14.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court was presented with an issue involving the admissibility of psychiatric testimony during the sentencing phase of a trial, where the psychiatrist was allowed to provide his "expert" opinion about the "future dangerousness" of the defendant. The defendant argued that admission of psychiatric testimony regarding future dangerousness of individuals was so inherently unreliable that its admission against a defendant was unconstitutional.



This Court rejected the defendant's argument:

Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made . . . .

In the second place, the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored . . . .

. . . Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view [that such testimony is unreliable] . . . . If they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so . . . . Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced . . . .

*Id.* at 898-899.<sup>30</sup>

The concern that evidence may be unreliable in certain situations does not warrant a per se ban on admissibility in all situations.

### **B. Polygraph Evidence Does Not Mislead Or Confuse Juries, Nor Do Juries Give Polygraph Evidence Undue Weight**

The first three reasons advanced by the drafters of Mil. R. Evid. 707 deal with a belief that juries will rely too much upon polygraph evidence; their province to determine guilt will be invaded, and they will become confused about the issues in the case.<sup>31</sup> These reasons are not supported by studies involving civilian juries. Further, they disregard the President's confidence in the unique ability of court-members to deal with complex issues in courts-martial. Moreover, these concerns undermine confidence in the adversarial criminal justice system, as expressed by this Honorable Court.

#### **(1) Polygraph Evidence Does Not Mislead or Confuse Juries**

Scientific studies have shown that juries are not unduly influenced or confused by polygraph evidence. See *United*

<sup>30</sup> Respondent agrees inherently unreliable evidence may not be constitutionally required to be admitted. *Rock*, 483 U.S. 44, 62 (1987) (Rehnquist, C.J., White, J., O'Connor, J., Scalia J., dissenting). "Inherent" is defined in Webster's Dictionary as "involved in the constitution or essential character of something: belonging by nature or settled habit." Webster's Ninth New Collegiate Dictionary 622 (1991). Polygraph evidence, however, is clearly not "inherently" unreliable for what it purports to measure.

<sup>31</sup> Contrary to the drafters' analysis, a jury does not, of course, determine innocence. It acquits based upon the prosecution not meeting its burden of proof.

*States v. Piccinonna*, 885 F.2d 1529, 1533 n. 14 (11<sup>th</sup> Cir. 1989) (citing three studies). In one study, 19 lawyers who participated in 220 criminal cases in Wisconsin court rooms between the years 1976 and 1979—when polygraph evidence was admissible in criminal trials pursuant to stipulation between the prosecution and defense—responded to a survey about its impact. *Not one* lawyer felt polygraph testimony disrupted the trial. Only two of the nineteen lawyers believed the jury disregarded other significant evidence (other than the testimony of the defendant) because of the use of the polygraph. R. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 American Bar Association Journal 162 (1982).

Another study analyzed the case of *United States v. Grasso*, a case tried in United States Federal Court, Boston, Massachusetts, in June 1973. In this case, the defendant offered an exculpatory polygraph in support of his alibi defense. This evidence went to the jurors, and the defendant was acquitted. After trial, lawyers interviewed eight of the twelve jurors to determine the effect of the polygraph evidence. The jurors stated they were not unduly influenced by the polygraph evidence. F. Barnett, *How Does A Jury View Polygraph Examination Results*, 2 Polygraph 275 (1973).<sup>32</sup> See also *State v. Porter*, 241 Conn. 57, \_\_A.2d\_\_ (1997) (“[w]e acknowledge, however, that other commentators have specifically asserted that juries will not be overly impressed by such evidence. At present, empirical data regarding the impact of scientific testimony on juries is almost entirely lacking”); *State v. Dean*, 103 Wis. 2d 228, 276, 307 N.W.2d 628, 652 (1981) (“[w]e have no empirical data as to . . . the influence of polygraph evidence on the conduct of the trial or on the jury verdict”). In the face of this evidence (or lack thereof), a *per se* rule of evidentiary

<sup>32</sup> Respondent assumes that, despite overwhelming evidence to the contrary, juries universally decided cases consistent only with the polygraph evidence admitted. As noted, however, the few studies that have been conducted on this issue have shown to the contrary.

exclusion based upon a concern that juries in all cases will be “confused” or unduly swayed is not justified.

Additionally, the unique qualifications of military court members, make it unlikely they would be unduly influenced or confused by polygraph evidence, particularly in the respondent’s case, with a court panel of military officers.<sup>33</sup> The adoption of other rules of evidence for military courts-martial show that the President has the utmost confidence that court-members will not be confused or misled by expert testimony. In fact, when the drafters wrote Mil. R. Evid. 704 allowing an expert to testify concerning the ultimate issue in a case (contrary to the Federal Rule) they justified this difference based on the sophistication of military court members. “The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts.” MCM, United States, 1984, (1995 ed.) App. 22, p. A22-46.

This Honorable Court has also expressed confidence in the ability of juries to separate the wheat from the chaff regarding scientific evidence:

We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses

<sup>33</sup> Article 25(d)(2), 10 U.S.C. 825, states in pertinent part: “When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” Generally, court-martial panels are comprised of military officers, although enlisted personnel may serve at the accused’s request. All officers detailed to courts-martial have at least a bachelors degree, and many have graduate degrees. Almost without exception, enlisted personnel detailed to a panel have a high school degree, and many have more advanced degrees. See *United States v. Curtis*, 44 MJ 106, 171 (1996) (Sullivan, J., concurring) (“The military jury is hard to fool and its intelligence should not be underestimated.”)

apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

*Daubert*, 509 U.S. at 595, quoting *Rock*, 483 U.S. at 61 (1987).

Finally, approximately 30 jurisdictions in the United States (22 states plus 8 federal circuits) allow for the admission of polygraph evidence by stipulation or otherwise.<sup>34</sup> Petitioner provides no direct evidence that the admission of polygraph results in those jurisdictions has confused or misled juries.

## (2) Polygraph Evidence Does Not Intrude On Traditional Functions Performed By The Jury

The drafters were also concerned that the use of polygraph evidence would preempt the court-members' "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence. . . ." MCM at App. 22, p. A22-48. Petitioner further argues that the admission of polygraph evidence intrudes on the credibility determination of the trier of fact. Brief for Petitioner, at 27. These arguments are not persuasive.

<sup>34</sup> The admissibility of polygraphs in the state and federal jurisdictions will be discussed *infra*.

The petitioner specifically argues that juries weigh credibility of witnesses based on first-hand observation of witnesses. Brief for Petitioner, at 28. In our evidentiary system, factfinders are not limited to only *first-hand* observation of witnesses in making credibility determinations. Other evidence which helps the jury assess the credibility of witnesses is routinely admitted, e.g. character for truthfulness/untruthfulness; bias evidence; evidence of prejudice; prior inconsistent statements; prior consistent statements; prior convictions, motive to misrepresent; post-traumatic stress/rape trauma syndrome testimony; and child sexual abuse accommodation syndrome, *etc.* "[W]e allow the prosecution to introduce expert testimony, which is far less reliable than the polygraph, to bolster the credibility of the state's case in other situations."<sup>35</sup> *State v. Porter*, 241 Conn. 57, \_\_A.2d\_\_ (Conn. 1997) (Berdon, J., dissenting) (citing cases where expert testimony was admitted to show typical behavior patterns of victims of various assaults).

The Child Sexual Abuse Accommodation Syndrome is one such example. The controversial nature of this syndrome and expert disagreement as to its utility have not precluded the prosecution from using it to assist the fact finder in determining an alleged victim's credibility. *United States v. Suarez*, 35 MJ 374, 376 (CMA 1992), citing Myers, *et al*, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1 (1989); *Hall v. State*, 611 So.2d 915 (Miss. 1992) (expert testified that behavior of alleged victim was common for a sexually abused child). In the face of admission of this evidence, it is arbitrary and unreasonable to limit exculpatory polygraph

<sup>35</sup> Testimony by an expert concerning post-traumatic stress syndrome and rape trauma syndrome testimony is designed to bolster the credibility of the victim. In such a case, the expert is testifying that a rape/child abuse victim frequently exhibits certain symptoms, as does the alleged victim. Such testimony directly makes the alleged victim more "credible" in the eyes of the expert and the jury. See *State v. Steven G.B.*, 204 Wis. 2d 108, 552 N.W.2d 897 (Wis. Ct. App. 1996) and cases cited therein.



evidence by an accused after he testifies based upon an argument that such evidence "duplicates" a jury's credibility-assessing function.<sup>36</sup>

Further, polygraph evidence does not provide the ultimate determination of guilt for the jury. The polygraph examiner would only testify that the responses to relevant questions indicated "no deception," not that, in the examiner's opinion, the examinee did not commit the crime alleged. Petitioner also argues that Fed. R. Evid. 704(b) does not allow an expert witness testifying with respect to the mental state or condition of a defendant to opine whether the defendant did or did not have a mental state or condition constituting an element of the crime charged. Brief for Petitioner, at 29. As noted earlier, in the military, experts *are* allowed to provide "ultimate opinion" testimony. *United States v. Benedict*, 27 MJ 253 (CMA 1988). See Mil. R. Evid. 704. Such testimony has not been shown to overwhelm military court-members nor has it usurped their fact-finding role. Further, state courts have admitted expert testimony regarding an expert's belief as to the truth of an allegation. See *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Wis. Ct. App. 1996) (expert replied to question as to cause of medical condition "[m]y opinion is that she was molested"); *State v. French*, 233 Mont. 364, 760 P.2d 86 (1988) (noting that a school counselor could offer opinion testimony that a six year old victim was telling the truth).

Finally, juries will not have the mistaken belief that a polygraph expert has independently conducted an investigation and determined the truth for the jury. See, e.g., *United States*

<sup>36</sup> Amici for the Petitioner, Criminal Justice Legal Foundation, argues that in order to admit exculpatory polygraphs, inculpatory polygraphs would also have to be admitted because, if not, a defendant would have nothing to lose. This argument has no basis in fact. Plenty of suspects, who later confess, fail polygraphs in jurisdictions that do not allow polygraphs to be admitted, as noted by Amici. Brief, *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, at 19, 20.

*v. Adkins*, 5 USCMA 492, 18 CMR 116 (1955) (discussing one of the policy reasons for prohibiting a witness from commenting on the truth of the allegations). The jury will understand the circumstances under which the examiner is testifying, having been educated to the risks of polygraph evidence through expert testimony, cross examination, and cautionary instructions by the judge. See *Barefoot*, 463 U.S. at 901; *Rock*, 483 U.S. at 61. The results of a polygraph provide court members with highly relevant information to help *them* determine the credibility of the witness. The concern that polygraph evidence constitutes "ultimate opinion testimony" is not valid.

### C. The Admission Of Polygraph Evidence Is Neither A Waste Of Time Nor A Substantial Burden On The Criminal Justice System

Petitioner contends that allowing an accused the opportunity to lay a foundation for the admission of polygraph evidence can result in a substantial waste of time and that polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. Brief for Petitioner, at 29, 30. This argument ignores the fact that highly technical, time consuming, scientific evidence is admitted *against* accuseds every day in our criminal justice system. Today, the Armed Forces routinely prosecute complex urinalysis cases, such as the one in the case *sub judice*. In a litigated urinalysis case, such as respondent's, the prosecution is required to call an expert witness to explain the scientific test results to the fact-finder and lay a proper foundation for their admission. *United States v. Hunt*, 33 MJ 345 (CMA 1991). This is the only evidence required to prove an accused knowingly used drugs. Typically, an accused offers his own expert witness. Such cases are procedurally complex, highly technical, and can be very costly to try. Similarly, the Armed Forces and prosecutors have welcomed with open arms the use of

DNA evidence in courts-martial, with all of its "procedural complexities." *United States v. Thomas*, 43 MJ 626 (AF Ct. Crim App 1995).

Courts admit testimony of "Drug Recognition Experts" regarding "horizontal gaze nystagmus" (HGN) (purporting to identify drivers under the influence of drugs or alcohol by noting the rapid involuntary horizontal oscillation of their eyes when attempting to follow a target). See *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994) (court admitted HGN testimony despite the fact the evidentiary hearing required the testimony of 14 witnesses); *State v. Williams*, 388 A.2d 500 (Me. 1978) ("extensive preliminary hearing" required before admitting spectrography voiceprint analysis).

Studies have also shown that courts admitting polygraph evidence are not unduly burdened by evidentiary hearings. See Peters, *A Survey of Polygraph Evidence in Criminal Trials*, *supra*. (Survey of 11 cases where experts testified regarding polygraph evidence showed that such testimony consumed, at most, 5 hours of trial time).

Prosecutors and courts cannot be expected to allow "procedural complexities" at trials to perfect the government's case, while denying an accused the opportunity to present a defense. Mil. R. Evid. 707 arbitrarily limits admission of evidence by the defense to a greater degree than by the prosecution. As such, it is an invalid, disproportionate limitation upon a accused's right to present a defense.

Nothing further demonstrates this point than the circumstances of this particular case. The respondent's AFOSI polygraph was taken at the request of the government. Because it was conducted by a certified government polygraph examiner, the examiner's expertise and the reliability of his technique were not at issue. Therefore, the admission of polygraph evidence in this case would not have wasted the court's time or burdened the military justice system.

#### **D. There Is No Widespread Judicial Support For A *Per Se* Prohibition On Polygraph Admissibility**

Petitioner argues that "the general rule in most States is that the results of polygraph examinations are inadmissible in criminal trials, primarily because of the lack of adequate scientific support for their reliability." Petitioner further argues that "no court of appeals, however, has concluded that polygraph testing is scientifically valid or that the results of a polygraph test were reliable enough to be admitted into evidence." Brief for Petitioner, at 31, 34. *Amici* argue that "the majority of States have an analogous [to Mil. R. Evid. 707] exclusion of polygraph evidence [rule]." Brief for the State of Connecticut and 27 States as *Amici Curiae* in Support of Petitioner, at 4. A careful review of these states' cases, however, demonstrates that there is no widespread support for a *per se* polygraph exclusion rule.

In the federal system, eight jurisdictions currently allow the results of a polygraph to be admitted, under certain circumstances, if a proper foundation is laid. See *United States v. Lynn*, 856 F.2d 430 (1<sup>st</sup> Cir. 1988) (judge's discretion); *United States v. Kwong*, 69 F.3d 663, 667-669 (2d Cir. 1995) (judge's discretion), cert denied, 116 S.Ct. 1343 (1996); *United States v. Posado*, 57 F.3d 428 (5<sup>th</sup> Cir. 1996) (judge's discretion); *United States v. Sherlin*, 67 F.3d 1208, 1216, 1217 (6<sup>th</sup> Cir. 1995) (unilateral polygraphs not admissible, judges discretion); *United States v. Olson*, 978 F.2d 1472 (7<sup>th</sup> Cir. 1992) (judge's discretion); *Anderson v. United States*, 788 F.2d 517, 519 n.1 (8<sup>th</sup> Cir. 1986) (by stipulation); *United States v. Williams*, 95 F.3d 723 (8<sup>th</sup> Cir. 1996) (judge's discretion); *United States v. Cordoba*, 104 F.3d 225, 227-228 (9<sup>th</sup> Cir. 1997) (judge's discretion); *United States v. Piccinonna*, 885 F.2d at 1529 (11<sup>th</sup> Cir. 1989). The remaining four jurisdictions generally do not admit polygraph evidence. The Tenth Circuit seems to apply an abuse of discretion standard and has allowed polygraph results to be

admitted only in limited circumstances. See *Palmer v. Monticello*, 31 F.3d 1499 (10<sup>th</sup> Cir. 1994). The D.C. Circuit excludes the results of polygraphs based on its 70 year old *Frye* holding. *United States v. Skeens*, 494 F.2d 1050 (D.C.Cir. 1974). In 1991, the Fourth Circuit noted the serious constitutional concerns involving a *per se* rule of inadmissibility of polygraph evidence, when offered by an accused, but left issue unresolved. *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n.4 (4<sup>th</sup> Cir. 1991). Finally, the Third Circuit has not directly addressed the question, but seems to allow polygraph evidence in rebuttal. *United States v. Johnson*, 816 F.2d 918 (3<sup>rd</sup> Cir. 1987) (evidence concerning polygraph examination may be introduced to rebut assertion of coerced confession).

Twenty two states allow polygraph evidence to be admitted in their jurisdictions in one form or another. See Brief for the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner, at 5, n 1. Twenty seven states plus the District of Columbia currently do not allow for the admission of polygraph evidence in criminal proceedings. *Ibid.*, at 4, n 1.<sup>37</sup> Vermont has not spoken on the subject. However, in *State v. Hamlin*, 146 Vt. 97, 109, 499 A.2d 45, 54 (1985), the State agreed that the admission of polygraph evidence was within the discretion of the trial judge.

The states that exclude polygraph evidence can be divided into two general categories. The majority of these states apply

<sup>37</sup> Eleven of the State's Attorney General who support the amicus brief on behalf of petitioner do not have *per se* rules in their states against laying a foundation for the admission of polygraph evidence analogous to Mil. R. Evid. 707. See *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990); *People v. Fudge*, 7 Cal. 4<sup>th</sup> 1075, 875 P.2d 36 (1994); *Holcomb v. State*, 268 Ark. 138, 594 S.W.2d 22 (1980); *Melvin v. State*, 606 A.2d 69 (Del. 1992); *Cassamassima v. State*, 657 So.2d 906 (Fla. Dist. Ct. App. 1995); *Forehand v. State*, 477 S.E.2d (Ga. 1996); *Sanchez v. State*, 675 N.E. 2d 306 (Ind. 1996); *State v. Weber*, 260 Kan. 263, 918 P.2d 609 (1996); *State v.*

the *Frye* general acceptance test.<sup>38</sup> Implicit in excluding polygraph evidence under the *Frye* test is the understanding that in any particular case, a party can attempt to show that polygraph evidence has been generally accepted and is admissible. In fact, studies indicate that the relevant scientific community *does* very substantially, if not even "generally," accept polygraph evidence as helpful. See McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, U. Ill. L. Rev. 420 (1996) (1982 and 1992 studies showed that 60% and 80%, respectively, of psychophysicologists believed the modern polygraph technique was useful when considered with other evidence). Therefore, states applying the *Frye* test, even with their reluctance to admit polygraph evidence, do not go as far as Mil. R. Evid. 707, which prevents an accused from even *attempting* to lay the foundation for his exculpatory polygraph, taken under circumstance assuring its reliability.

The remaining states hold that polygraph evidence is *per se*

*Cantaneze*, 368 So.2d 975 (La. 1979) (admissible in post-trial proceedings); *Dominques v. State*, 917 P.2d 1364 (Nev. 1996); *State v. Wright*, 471 S.E.2d 700 (S.C. 1996); *State v. Renfro*, 96 Wash. 2d 902, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). *Amici* imply that Mississippi does not have a *per se* bar to the admission of polygraph results at trial. Brief of the State of Connecticut and 27 States, at 5 n.1. This is incorrect, as it does. Mississippi, however, does allow evidence that a witness was *willing* to take a polygraph (but not the results) to be admitted in order to rehabilitate an impeached witness. *Connor v. State*, 632 So.2d 1239 (Miss. 1993). Since Mil. R. Evid. 707 does not even allow polygraphs to be mentioned for that purpose, respondent will count Mississippi among those jurisdictions that have polygraph rules contrary to Mil. R. Evid. 707.

<sup>38</sup> See e.g. *Dowd v. Calabrese*, 585 F.Supp. 430 (D.D.C. 1984) (defendants offering polygraph results bear burden of showing that the conditions which led to judicial rejection of polygraphs under *Frye* no longer exist); *People v. Angelo*, 88 N.Y. 2d 217, 666 N.E.2d 1333 (1996) (must show general scientific acceptance of test); *State v. Hamlin*, 146 Vt. 97, 499 A.2d 45 (1985) (must show acceptance in scientific community).



inadmissible because they believe it to be unreliable too prejudicial, or an undue burden on the judicial system.<sup>39</sup> Courts that exclude polygraph evidence based on its unreliability, however, improperly require near perfect accuracy rates for polygraph tests, something that is not required for other evidence.<sup>40</sup> See *Rock*, 483 U.S. at 61; *Barefoot*, 463 U.S. at 898; *Manson*, 432 U.S. at 13. This requirement ignores the fact that DNA evidence, handwriting analysis, eyewitness testimony, and other types of evidence may be very unreliable in a particular case, but are nonetheless admissible. *State v. Sims*, 52 Ohio Misc. 31, 47; 369 N.E.2d 24, 34 (1977); See *Quaker City Hide Company and Edward E. Goldberg & Sons, Inc. v. Atlantic Richfield Company*, 10 Phila. 1, 1983 Phila. Cty. Rptr. LEXIS 2 (Pa. Comm. Pleas Ct. Phila. Co. 1983); *J. Widacki & F. Horvath, supra*.

Further, as previously discussed in Section IIA, *supra*, numerous studies have found polygraph evidence to be very accurate. Federal and local governments, including prosecutors, rely on polygraphs to make critical decisions every day. The Department of Defense alone conducted over 370,000 poly-

<sup>39</sup> See, e.g. *State v. Porter*, 241 Conn. 57, \_\_\_ A.2d \_\_\_ (Conn. 1997) (always too prejudicial); *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991); *State v. Opsahl*, 513 N.W. 2d 249 (Minn. 1990). But see *State v. Schaeffer*, 457 N.W.2d 194 (Minn. 1990); *State v. Staat*, 811 P.2d 1261 (Mont. 1991) (unreliable); *State v. Ober*, 493 A.2d 493 (N.H. 1985) (*per se* unreliable and jury will rely on polygraphs too much); *Paxton v. State*, 867 P.2d 1309 (Okla. 1994) (unreliable); *State v. Campbell*, 904 S.W.2d 608 (Tenn. Ct. App. 1995) (inherently unreliable); *State v. Beard*, 461 S.E.2d 486 (W. Va. 1995) (unreliable, reviewed *Daubert*); *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (Wis. 1981) (burden on judicial system. Court finds polygraph evidence, however, has "a degree of validity and reliability"); *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159 (1986) (unreliable); *In re Odell*, 672 A.2d 457 (R.I. 1996) (rule based on *Frye*, but also inadmissible under *Daubert* because not reliable).

<sup>40</sup> "Critics of polygraph evidence seem to forget that no evidence can be said to be one hundred percent accurate." J. Canham, *Military Rule of Evidence 707: A Bright Line Rule That Needs to be Dimmed*, 140 Mil. L. Rev. 65 (1993).

graph examinations between the years 1981 and 1996. Fiscal Years 1986-1996, DoD Polygraph Program *Annual Polygraph Report to Congress*, Office of the Assistant Secretary of Defense (OASD) for Command, Control, Communications, and Intelligence (C3I); *Quaker City Hide Company, supra* (noting polygraphs are widely used with confidence by the military, federal, state, and local law enforcement agencies, and other institutions all over the country); *Paxton v. State*, 867 P.2d 1309, 1323 (Okla. 1994) (charge was dismissed "to best meet the end of justice . . . Defendant cleared by polygraph test"); *State v. Steven G.B.*, 204 Wis. 2d 108, 552 N.W.2d 897 (1996) (Sundby, J., concurring) (noting district attorneys use polygraph evidence to make charging decisions); *People v. McCormick*, 859 P.2d 846 (Colo. 1993) (prosecutors require that agreements to take polygraphs be included in plea agreements in order to "unequivocally demonstrate" that a defendant is truthful).

Finally, numerous state courts have found polygraph evidence to be reliable. See *Commonwealth v. Mendes*, 547 N.E.2d at 36 (trial court found polygraph evidence valid); *State v. Porter*, 241 Conn. 57, \_\_\_ A.2d \_\_\_ (polygraph evidence has enough demonstrated validity to pass *Daubert* test). There is no widespread judicial support for a *per se* prohibition on polygraph evidence and even among those states that prohibit the introduction of polygraph evidence, no consensus exists justifying such a ban.

#### **E. The Experience Of New Mexico With Its Open Polygraph Admissibility, Rule Refutes The Reasons Advanced For The Promulgation of Military Rule of Evidence 707**

In *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (N.M. 1975), the Supreme Court of New Mexico ruled that polygraph evidence would thereafter be admissible in New Mexico without the requirement of a prior stipulation between the parties. The

Court found that its previous stipulation requirement, created because of concerns about the reliability of polygraphs, was "mechanistic in nature," "inconsistent with the concept of due process," and "[r]epugnant to the announced purpose and construction of the New Mexico Rules of Evidence." "These rules shall be construed to secure fairness in administration \* \* \* and promotion of growth and development of the law of evidence . . . ." *Id.* at 205. Cf. Mil. R. Evid. 102; Fed. R. Evid. 102.

In 1983, the Supreme Court of New Mexico promulgated Rule of Evidence 11-707, which established procedural requirements for the admission of polygraph evidence. N.M. Stat. Ann. § 11-707 (Michie 1993). Among other requirements, the rule requires a party wishing to admit polygraph evidence provide 30 days notice before trial and provide the opposing party with all documents related to the polygraph he or she wishes to admit, including any past polygraphs taken by the examinee. The rule also provides definitions of key polygraph terms, minimum training requirements for polygraph examiners, and procedures that must be complied with during the giving of the examination. N.M. Stat. Ann. § 11-707. The purpose of the rule, other than the obvious benefit of providing uniformity, is to prevent surprise and give the opposing party an opportunity to collect rebuttal evidence. *State v. Baca*, 120 N.M. 383, 388, 902 P.2d 65, 70 (1995). Although the rule establishes requirements before polygraph results are admissible, the Supreme Court of New Mexico has refused to follow a mechanical application of the rule (such as the notice requirement). 902 P.2d at 70.

Concerns about the reliability of polygraphs and its effect upon a jury have been the subject of many studies, both in the laboratory and in the "field." Petitioner has cited to this Court, as has respondent, many of those studies. New Mexico, however, has admitted polygraphs without significant restriction (such as prior stipulation) for the past 22 years. Petitioner

cites to no study or case law from New Mexico showing that polygraphs have proven to be inherently unreliable, a burden upon the criminal justice system, confusing to juries, or that they have usurped the jury's fact-finding role. On the contrary, New Mexico's experience directly rebuts the reasons advanced for the creation of Mil. R. Evid. 707.

### III. Military Rule Of Evidence 707 Is Not Entitled To Deference By This Court

"When we assumed the Soldier, we did not lay aside the Citizen."— George Washington<sup>41</sup>

Petitioner argues that in the context of the military, a servicemember challenging a rule of evidence has an "extraordinarily weighty" burden in "overcom[ing] the balance struck by Congress" citing *Weiss v. United States*, 510 U.S. 163, 177-178 (1994). Brief for Petitioner, at 14.

Respondent disagrees with this analysis. On the contrary, the burden is on the United States to justify its *per se* evidentiary rule of exclusion: "Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections." *Rock*, 483 U.S. at 61. The standard in *Weiss* does not apply here because the President did not promulgate Mil. R. Evid. 707 out of a concern for "balancing the rights of servicemen against the needs of the military . . . ." *Weiss*, 510 U.S. at 177. None of the reasons set forth in the drafter's analysis to Mil. R. Evid. 707 indicates the rule was created out of a concern for the unique nature or structure of the military.

Further, in Mil. R. Evid. 702, which was adopted in the early 1980s, the President *eliminated* what had been a *per se*

<sup>41</sup> Address to the New York Legislature, 26 June 1775, as cited in *The Columbia Dictionary of Quotations*, 1993.

policy excluding the results of polygraphs at courts-martial.<sup>42</sup> The previous provision stated that "[t]he conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug induced or hypnosis-induced interview are inadmissible evidence."<sup>43</sup> MCM, United States, 1969, Para 142e. The Analysis to Mil. R. Evid. 702 further notes (in regard to polygraphs),

Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact."

MCM, United States, 1984, App. 22, p. A22-45. If the President was not concerned about balancing the needs of the servicemember with the needs of the military when creating a rule of evidence, no special deference to the creation of the rule should be given.

Petitioner notes that Article 36 of the Uniform Code of Military Justice, 10 U.S.C. §836, authorizes the President to prescribe rules of evidence for courts-martial. Brief for Petitioner, at 42. Article 36 allows the President "so far as he considers practicable, [to] apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." A *per se* rule of inadmissibility regarding polygraph evidence, however, is not a "generally recognized" rule of evidence. As discussed, most of the federal circuits do not have a *per se* rule of exclusion regarding polygraph evidence, let alone a *per se* rule that does not even allow an

<sup>42</sup> See *United States v. Helton*, 10 MJ 820 (AFCMR 1981).

<sup>43</sup> The previous *per se* bar in the military to hypnotically induced testimony of a defendant would today be ruled unconstitutional in light of *Rock*.

accused the opportunity to attempt to lay a foundation for the admission of this exculpatory scientific evidence, or even permit the mention of the word "polygraph." The military justice system stands essentially alone with its draconian polygraph rule.<sup>44</sup>

Petitioner contends that the Court of Appeals' opinion does not reflect consideration that the military is a specialized society separate from civilian society, and argues that the costs associated with offering polygraph evidence are unwarranted and onerous for the military. Brief for Petitioner, at 39-43. This argument fails to recognize the role of the Court of Appeals for the Armed Forces in the military justice system, the reasons articulated by the President for the promulgation of Mil. R. Evid. 707, and the nature of the case launched by the prosecution against the respondent at his court-martial.

The Court of Appeals for the Armed Forces is uniquely qualified to consider the special requirements and concerns of the Armed Forces, a task it has been doing for the past 46 years. The Court was specifically created to safeguard the rights of servicemembers. In creating the UCMJ and the present appellate structure in 1950, Congress increased oversight of the military justice system. As Congressman Philbin from Massachusetts noted about the then named Court of Military Appeals:

[I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the

<sup>44</sup> The "arbitrary" standard adopted by the Air Force Court of Criminal Appeals in the case *sub judice* is not the correct test for upholding *per se* rules of evidentiary exclusion. Such a low threshold would allow the President to promulgate just about any evidentiary rule of exclusion, since such rules would not be arbitrary so long as they were based on some assumption supported by other authority, however slight.



top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

95 Cong. Record 5726 (1949). Because of this unique character, this Honorable Court should give great deference to the Court of Appeals' determination that, in the context of the military criminal justice system, the reasons set forth for the creation of Mil. R. Evid. 707 did not warrant a *per se* ban on the ability of a military accused to lay a foundation for the admission of exculpatory polygraph evidence. See *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

In 1976, this Court noted that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Id.* at 45-46. This concern is not valid today. With respect to Air Force trial participants, officers are assigned as military judges, circuit defense counsel, and circuit trial counsel whose sole jobs are to try courts-martial throughout the world.

Petitioner's argument does not take into account that the Air Force, in deciding to prosecute servicemembers solely based upon a positive urinalysis test result, has created a very complex and expensive litigation network. In such cases, the prosecution must call an expert witness to explain the test result to the fact-finder and lay a proper foundation for its admission. The complexities are amply demonstrated by a court member

challenge issue that occurred during the prosecution's case-in-chief in the respondent's case.<sup>45</sup> One court member described the testimony of the prosecution's drug expert as a "course in forensic toxicology." Additionally, an accused is entitled to his own expert and "a battle of the experts" ensues. Such evidence and testimony can be expensive and time consuming. Thus, an argument that the introduction of "procedural complexities" into military trials is a burden to the Armed Forces fails here.

Finally, it is particularly unfair to consider the special needs of the military in respondent's case when the government had two alternative ways to check whether he used drugs—the polygraph examination and the urinalysis. Through its rules of evidence, the government only allowed the urinalysis result to be admitted at respondent's court-martial.

## CONCLUSION

The narrowly tailored holding of the Court of Appeals for the Armed Forces must stand. Admission of polygraph evidence is compelled under the facts of Airman Scheffer's case. The government requested the examination, a government certified examiner conducted the examination, and the government attacked Airman Scheffer's credibility after he testified. Military Rule of Evidence 707 precluded Airman Scheffer from even attempting to lay a foundation for the admission of evidence which was critical to his defense.

<sup>45</sup> The President of the panel was excused from the case after inappropriately discussing the facts with the base Staff Judge Advocate during a trial recess. Record 203. The President had also seemed incredulous that Airman Scheffer would actually plead not guilty in the face of a positive urinalysis test. Record 201. During questioning of the remaining members about their possible partiality, several members felt that they received a "course in forensic toxicology" after hearing the testimony of the prosecution's drug expert. Record 204.

As the Court of Military Appeals noted in *Gipson*:

In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion . . . . Rather, until the balance of opinion shifts decisively in one direction or the other, the latest developments in support of or in opposition to particular evidence should be marshaled at the trial level.

24 MJ at 253.

Mil. R. Evid. 102 states that the rules of evidence "shall be construed to promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Mil. R. Evid. 707 stunts that growth. In 1923, Wigmore wrote "[i]f there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it . . . . Whenever the Psychologist is really ready for the Courts, the Courts are ready for him." 2 J. Wigmore, *A Treatise On The Anglo-American System of Evidence In Trials At Common Law* 875 (2d ed. 1923). In this case, polygraph evidence would not have impeded the discovery of truth in a court of law, but promoted it. The law should run to meet it.

WHEREFORE, the decision of the United States Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted,

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No. 96-1133

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

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v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

### REPLY BRIEF FOR THE UNITED STATES

1. Respondent's argument that Military Rule of Evidence 707 abridges the Sixth Amendment rests principally on two propositions: (1) that a criminal defendant has a “fundamental right” to lay a foundation for any potentially exculpatory evidence; and (2) that polygraph evidence has achieved sufficient reliability that no institutional rulemaker—President, Congress, or state legislature—may impose a *per se* ban on such evidence. Those arguments misstate the constitutional requirements for trials and misapply the applicable principles in the context of polygraph evidence.<sup>1</sup>

<sup>1</sup> Respondent notes that, in *United States v. Posado*, 57 F.3d 428, 432 (5th Cir. 1995), “the United States agreed that a *per se* rule against admitting polygraph evidence was no longer viable after *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Respondent believes the United States' position in

a. Respondent's assertion of a "fundamental right" to lay a foundation for the introduction of polygraph evidence is incorrect for several reasons. First, this Court has repeatedly looked to whether the rule imposed is "arbitrary or disproportionate to the purposes [it is] designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). As we explained in our opening brief (Gov't Br. 15-17), a per se rule is no more suspect than an individual judge's ruling in a particular case if the societal "interests served by [the] rule justify [its] limitation." *Rock*, 483 U.S. at 56. See also *Michigan v. Lucas*, 500 U.S. 145, 151 (1991). Respondent suggests that every defendant has a constitutional right to "lay a foundation" to present any potentially exculpatory evidence, however generally unreliable it may be and irrespective of the legitimate interests underlying a categorical exclusion of such evidence.<sup>2</sup> Respondent does not, however, cite any lower court decisions (other than the decision below) applying that principle to hold that a defendant has a

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*Posado* is the correct approach for a constitutional analysis." Resp. Br. 6. *Posado* involved Fed. R. Evid. 702 and the standard to be applied in determining the admissibility of scientific evidence. It did not involve the constitutionality of any rule relating to the admissibility of such evidence.

<sup>2</sup> Respondent suggests that, because Military Rule of Evidence 707 does not contain an exception for capital sentencing, it must therefore be unconstitutional for all purposes. See Resp. Br. 7 n.3. Since respondent's case does not implicate any of the issues that would arise in a capital case, this Court need not consider whether a per se rule prohibiting polygraph evidence would be unconstitutional if applied to bar mitigation evidence in a capital sentencing proceeding.

constitutional right to lay a foundation for the introduction of exculpatory polygraph evidence.<sup>3</sup>

Nor do the cases cited by respondent from this Court support his assertion of a "fundamental right" to "attempt to lay a foundation for the admission of exculpatory scientific evidence at his court-martial, \* \* \* and to present that favorable evidence if the proper evidentiary foundation is established," regardless of Rule 707. Resp. Br. 7. See *Taylor v. Illinois*, 484 U.S. 400 (1988); *Rock*, 483 U.S. at 44; *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967).

In *Taylor*, this Court found no Sixth Amendment violation in a trial judge's exclusion of a defense witness as a discovery sanction for failing to identify the witness in a timely fashion before trial. 484 U.S. at 413-414. And the remaining cases are collectively distinguishable in at least three ways.<sup>4</sup> First, in each the Court considered a restriction on a defendant's ability to introduce testimony of a witness who was present at the scene of the crime and had first-hand knowledge of the facts. See *Rock*, 483 U.S. at 57 (rule prevented defendant "from describing any of the events that occurred on the day of the shooting"); *Chambers*, 410 U.S. at 295 (testimony sought related to inconsistencies in out-of-court statements that another person committed the murder); *Washington*,

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<sup>3</sup> The cases cited by respondent that have permitted a defendant to lay a foundation for the admission of polygraph results did so by applying the rules of evidence, which are promulgated by legislatures and courts but are not, except in a few circumstances, compelled by the Constitution. See Resp. Br. 37-43.

<sup>4</sup> In *Chambers* the Court also specifically limited its holding to "the facts and circumstances of [t]his case." 410 U.S. at 303.



388 U.S. at 16 (testimony excluded was from “the only person other than [defendant] who knew exactly who had fired the shotgun and whether [defendant] had at the last minute attempted to prevent the shooting”). Polygraph evidence is quite different, however, because the examiner has no first-hand knowledge of the facts but instead is basing testimony on inferences drawn about the believability of the defendant in an examination after the events charged.

Second, in each case the Court concluded that adequate assurances existed for the reliability of the testimony that had been excluded. See *Rock*, 483 U.S. at 58-61 (hypnotically refreshed testimony sufficiently reliable when used with appropriate procedural safeguards); *Chambers*, 410 U.S. at 300 (out-of-court statements that had been excluded by the trial judge as inadmissible hearsay were made in “circumstances that provided considerable assurance of their reliability”); *Washington*, 388 U.S. at 23 (state rule barring testimony of alleged accomplice “leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie”). For the reasons given in our opening brief (Gov’t Br. 18-26) and pages 5-11, *infra*, polygraph evidence lacks similar assurances of reliability and, contrary to respondent’s unsupported assertions, there is no specific reason to think the polygraph administered to respondent produced a reliable and accurate assessment of his truthfulness.

Third, in each case the application of the evidentiary or procedural rule fell disproportionately on the defendant. Thus, in *Chambers* the combination of the rule that parties “vouch” for their witnesses and thus cannot impeach them, when combined with the hearsay rule, had a particularly severe effect on the defen-

dant in that case who was surprised by the in-court change-of-positions by a person called to testify on the defendant’s behalf. Similarly, the hypnotically refreshed recollections excluded in *Rock* were those of the defendant—a unique form of evidence for which no substitute is available in a defense case. And in *Washington*, the rule under challenge expressly prohibited accomplices from testifying on behalf of the defendant. Here, a polygraph examination that has an inculpatory result is banned for the same reasons that one with an exculpatory result is excluded.

Ultimately, respondent concedes (Resp. Br. 12) that “an accused’s right to present relevant evidence is not absolute,” but then asserts that that principle “should not extend to *per se* exclusions of an *entire class* of exculpatory evidence. \* \* \* Though evidentiary rules may sometimes exclude relevant, exculpatory evidence, there are limits that prevent the exclusion of entire categories of evidence for all time.” *Id.* at 13. Respondent offers no explanation for what those “limits” might be. As we have demonstrated, however, a *per se* rule like Military Rule of Evidence 707 is constitutional unless it is “arbitrary” and not supported by legitimate justifications. See *Montana v. Egelhoff*, 116 S. Ct. 2013, 2022 (1996) (plurality opinion); *Lucas*, 500 U.S. at 151; *Rock*, 483 U.S. at 56.

b. The legitimate doubts that exist about polygraphy amply support a conclusion that prohibiting testimony based on such examinations is constitutional. Although respondent and his *amici* go to considerable lengths to try to establish that “polygraph evidence is sufficiently reliable in particular cases, and can be very critical to a defendant’s case” (Resp.

Br. 10), polygraph evidence is inherently unreliable as evidence in a trial.

First, there is no way of knowing whether a polygraph is, in fact, reliable in any given case. Polygraph test results are not replicable. A person found non-deceptive in an examination at one particular point in time might be found deceptive as to the same questions at a different point in time. Respondent and his *amici* do not dispute our contention (Gov't Br. 23) that such factors as amount of sleep, ingestion of coffee and other stimulants, and stress may alter the test results on a given day. The non-replicability of the test is compounded by the subjective nature of the results adduced by the examiner. Later analysis of test results by a person not in the examination room cannot provide sufficient assurance of reliability in a given examination. Regardless of how well trained a particular examiner might be, whether a person "passes" or "fails" the test will depend on what inferences the examiner draws from the results because there is no common physiological response known to be unique to deception.<sup>5</sup>

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<sup>5</sup> Respondent's observation (Resp. Br. 25) that government polygraph examiners are well trained is essentially irrelevant to the constitutional analysis of whether all defendants have a Sixth Amendment right to lay a foundation for the admission of exculpatory polygraph evidence. The government examiners are trained for the investigative purposes for which polygraphs are used by the Federal Government, and not to produce evidence or testimony designed to meet the standards of reliability that govern the admissibility of evidence in a criminal trial. As we have noted (Gov't Br. 23-24), the overwhelming majority of polygraphers in the United States have not been trained by the Federal Government, and are not required by any national accrediting board to meet any uniform national standards before becoming polygraphers.

Not only is the reliability of polygraphs open to serious doubt because of their subjectivity and non-replicability, an individual's ability to pass a polygraph by using undetectable countermeasures makes polygraphs even more suspect as reliable evidence in a courtroom. See Gov't Br. 24-25. In attempting to downplay the potential for countermeasures to skew the reliability of polygraphs, respondent suggests only that "spontaneous \* \* \* countermeasures" have been found ineffective, and cites a study by C. Honts, D. Raskin, and J. Kircher, who are generally known to be advocates of polygraphy. See Resp. Br. 24. That study, however, found that a simple "physical countermeasure (biting the tongue or pressing the toes to the floor) or a mental countermeasure (counting backward by 7) \* \* \* enabled approximately 50% of the [subjects] to defeat the polygraph test." C. Honts et al., *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 J. A. Psych. 252, 252 (1994). Those researchers further found that: "effective mental countermeasures \* \* \* are virtually undetectable instrumentally" (*id.* at 253); a person who trained in countermeasures for "no more than 30 min[utes]" significantly enhanced his ability to defeat the accuracy of a polygraph (*id.* at 257); and their "findings are consistent with prior research demonstrating that physical countermeasures are effective and are difficult to detect" (*ibid.*). That study was conducted in laboratory conditions, and the authors note that "it is unclear how countermeasures can be studied systematically in the field because successful use of countermeasures would be nearly impossible to identify in the context of most field examinations." *Id.* at 258. For a criminal suspect who would derive



the greatest forensic benefit from being found non-deceptive in a polygraph, therefore, even respondent's source establishes that efforts to fool the polygrapher will succeed a significant percentage of the time.<sup>6</sup> It is not arbitrary to impose an evidentiary limitation on a form of evidence so readily susceptible to manipulation by persons with a strong self-interest in doing so.

Finally, even if it is true that "leading practitioners in the field of polygraph[y] fiercely support its use, utility and reliability" (Resp. Br. 17), that support does not translate into a belief among scientists and polygraphers that polygraph evidence is sufficiently reliable to be admissible as evidence in a court of law or court-martial. Even respondent's citations support our position that polygraphy is used most effectively as an investigative tool. *Ibid.* As we explain in our opening brief (Gov't Br. 34 n.17), the Federal Government's use of polygraphy as an investigative method, however, does not mean that polygraph results are entitled to admissibility. An important distinction exists between a tool that may facilitate the obtaining of a confession or other information in an investigation and a technique whose reliability is sufficiently questioned that it should not be admitted into evidence.<sup>7</sup> In the most recent survey

<sup>6</sup> Respondent's fallback position is that "[a]ny possible problem with countermeasures in a given test is best explored through the time-honored mechanism of cross-examination." Resp. Br. 24. That response, however, begs the question of why polygraph results are needed at all at trial, if a defendant can testify in his own defense and successfully withstand cross-examination.

<sup>7</sup> The government employs a wide variety of techniques to attempt to obtain information and solve crimes, even though the information generated and preserved by those methods

of professional polygraphers, less than 30 percent of the members of the American Polygraphy Association and the Society for Psychophysiological Research would "advocate that courts admit into evidence the outcome of control question polygraph tests, that is, permit the polygraph examiner to testify before a jury that in his/her opinion, either defendant was [deceptive or truthful] when denying guilt." W. Iacono & D. Lykken, *The Validity of the Lie Detector: Two Surveys of Scientific Opinion*, 82 J. Applied Psych. 426, 430 (1997). And less than 36 percent of the respondents agreed that the control-question technique "is based on scientifically sound psychological principles or theory." *Ibid.*

Respondent argues (Resp. Br. 19-23) that various studies have ostensibly established the reliability of polygraphy. As we noted in our opening brief (Gov't Br. 18-21), polygraphy is a polarized field of inquiry that has its fervent proponents and skeptics. But no one can ever be satisfied that the behavioral analysis inherent in polygraphy is correct, because there is

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may be insufficiently reliable to be admissible into evidence. The notes taken by investigators reflecting their impressions about potential witnesses are helpful in the investigative process, for example, but they are inadmissible except in extraordinary circumstances. Similarly, arrest records of persons are very useful to investigators in generating leads and clues, but they are not admissible as proof of guilt of a charged crime. The gut instincts of a trained investigator can be very valuable to the hard work of solving a crime, but those instincts are not probative evidence of wrongdoing by a defendant, so an officer cannot testify to a jury that his instincts cause him to believe the defendant committed the offense. As the Brief *Amicus Curiae* of the Criminal Justice Legal Foundation In Support of Petitioner notes (at 15), polygraph's "ability to generate confessions is the most likely reason for the continued use of the polygraph by law enforcement and security personnel."



no objectively verifiable method of determining the accuracy of a polygraph examination. Laboratory studies cannot replicate the actual conditions—fear, concern, stress—that are present when a person is polygraphed while under suspicion for having committed an offense. Field studies rely on other evidence of guilt and have the tendency to overstate the efficacy of polygraphs because a finding of deception will result in further interrogation, which produces additional (often inculpatory) information, whereas a finding of non-deception will often result in no additional interrogation. Accordingly, the studies on which respondent and his *amici* rely have been criticized on any number of different grounds, including insufficient sample size, inability to replicate real testing conditions, lack of appropriate controls over relevant information, and other methodological shortcomings. See generally W. Iacono & D. Lykken, “The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests,” in 1 *Modern Scientific Evidence* §§ 14-3.1.1 to 14.3.3.5 (D. Faigman et al. eds. 1997).

In that respect, polygraphy is unlike the other types of scientific evidence cited by respondent. There is some readily observable and comprehensible basis for understanding comparisons between samples of DNA, handwriting, and fingerprints. Our scientific understanding of those fields is sufficient to accept that a person will produce the same DNA in different samples, generally form letters in the same handwriting style, and leave fingerprints looking the same. Our understanding of the “science” of polygraph has not led to agreement on any similar universal understandings. Indeed, one of the few points on which both proponents and skeptics of polygraphs

agree is that “there is no serious scientific support for” the notion that “certain patterns of physiological response \* \* \* are specifically indicative of lying.” W. Iacono & D. Lykken, *supra*, § 14-3.1.1, at 583; see also D. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 Utah L. Rev. 29, 31 (“No known physiological response or pattern of responses is unique to deception.”). Respondent contends that “[t]he concern that evidence may be unreliable in certain situations does not warrant a per se ban on admissibility in all situations.” Resp. Br. 29. Unlike other forms of evidence, however, there is no way of knowing whether any given polygraph result is “reliable.”<sup>8</sup> To use this case, for example, it is impossible to replicate respondent’s polygraph examination, to ascertain whether he employed countermeasures to evade a finding of deception, to determine whether ingestion of chemicals or the existence of environmental factors influenced the outcome of his polygraph, or to know whether the examiner’s evaluation was correct.

c. In addition to the unreliability of polygraphs, respondent also disputes the other reasons given by the President for promulgating Military Rule of Evidence 707. Respondent’s counterarguments, however, do not satisfy his high burden of establishing that the justifications underlying the President’s decision are invalid.

First, with respect to the intrusion on jury functions by polygraph evidence, respondent contends

<sup>8</sup> Indeed, the rules of evidence generally bar opinions (whether lay or expert) on whether witness was credible on a particular occasion. See Fed. R. Evid. 608(a); *United States v. Azure*, 801 F.2d 336, 339-340 (8th Cir. 1986).

(Resp. Br. 29-31) that the available information on the effect of polygraph testimony on juries is that juries are not unduly influenced, yet he acknowledges that "empirical data regarding the impact of scientific testimony on juries is almost entirely lacking." *Id.* at 30 (quoting *State v. Porter*, 241 Conn. 57 (1997)). As we noted in our opening brief (Gov't Br. 26-27), courts have frequently expressed the view that polygraphs distort the jury's fact-finding mission.<sup>9</sup>

Next, with respect to the President's concern that admission of polygraph evidence would lead to unproductive, collateral litigation, respondent contends that "highly technical, time consuming, scientific evidence is admitted *against* accuseds every day in our criminal justice system." Resp. Br. 35. Respondent cites surveys showing that polygraph testimony does not take very much time in trials. Those surveys are belied by the experience of actual cases. See Gov't Br. 30-31. See also Brief *Amicus Curiae* Connecticut et al. in Support of Petitioner 16-17 (describing experience of States). Respondent's contention (Resp. Br. 36) that "the admission of polygraph evidence in this case would not have wasted the court's time or burdened the military justice system" overlooks the collective impact of disputes over polygraph evidence on the judicial system.

<sup>9</sup> Respondent maintains (Resp. Br. 34) that polygraph testimony does not usurp the functions of the jury because "[t]he polygraph examiner would only testify that the responses to relevant questions indicated 'no deception,' not that, in the examiner's opinion, the examinee did not commit the crime alleged." Given that the applicable control question will typically ask for a direct answer of whether the subject committed the offense, respondent's distinction is surely one without a difference.

Finally, notwithstanding the long recitation of cases by respondent (Resp. Br. 37-38 & n.37), only one State permits polygraph evidence to be admitted over a party's objection—*i.e.*, in the absence of a stipulation between the parties. All other States either have imposed a *per se* prohibition on the admission of polygraph results or permit such evidence only by stipulation.<sup>10</sup> The cases cited by respondent do not support his assertion that "numerous state courts have found polygraph evidence to be reliable." Resp. Br. 41 (citing *Commonwealth v. Mendes*, 547 N.E.2d 35, 36-37 (Mass. 1989), which reversed Massachusetts' 15-year experiment with polygraph evidence by re-instituting a *per se* ban; and *State v. Porter*, 694 A.2d 1262, 1282 (Conn. 1997), which upheld the State's *per se* ban on polygraph evidence while also holding that *Daubert*, rather than *Frye*, was the appropriate standard for the admissibility of scientific evidence under state evidentiary rules).<sup>11</sup> Similarly, respon-

<sup>10</sup> Although respondent states that "[t]wenty two states allow polygraph evidence to be admitted in their jurisdictions in one form or another" (Resp. Br. 38), in all but one of those States (New Mexico), polygraph evidence is admissible only by stipulation of both parties. The Vermont Supreme Court has not addressed the issue. See *State v. Hamlin*, 499 A.2d 45, 53-54 & n.4 (1985).

<sup>11</sup> Likewise, in the post-*Daubert* federal cases cited by respondent (Resp. Br. 37), the court of appeals did not uphold the admissibility of polygraph evidence, but rather held that the standard for determining admissibility is *Daubert*, and not *Frye*. And those courts expressed doubts about whether polygraph evidence would be admissible in view of Federal Rule of Evidence 403. See, *e.g.*, *United States v. Cordoba*, 104 F.3d 225, 227-228 (9th Cir. 1997); *United States v. Williams*, 95 F.3d 723, 729 (8th Cir. 1996), cert. denied, 117 S. Ct. 750 (1997); *United States v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995). Thus, although it is true that the federal courts of appeals no



dent's statement that "[t]here is no widespread judicial support for a *per se* prohibition on polygraph evidence" (Resp. Br. 41) is belied by his acknowledgment that 27 States have *per se* prohibitions on the admission of polygraph evidence in criminal proceedings (*id.* at 38). Respondent thus relies on the experience of New Mexico, the lone State to permit polygraph evidence over the objection of a party. The experience of that one State does not render it arbitrary for the President to reach a contrary conclusion about the costs of admitting polygraph evidence.

2. If the Court agrees that the Sixth Amendment does not require admission of polygraph evidence, it need not reach our alternative submission that the military rule is entitled to special deference. Respondent makes three attacks on that submission, each of which lacks merit.

First, respondent asserts (Resp. Br. 43) that Military Rule of Evidence 707 is not entitled to special deference because "[n]one of the reasons set forth in the drafter's analysis to Mil. R. Evid. 707 indicates the rule was created out of a concern for the unique nature or structure of the military." No decision of this Court requires the President or Congress to articulate that a particular rule is special to the military before affording it deference. In *Weiss v. United States*, 510 U.S. 163 (1994), for example, this Court did not compel a special justification by Congress for the method of appointing military judges before recognizing the political branches' "plenary control over rights, duties, and responsibilities in the

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longer are invoking *Frye* for a *per se* rule against the admission of polygraph evidence, the reported decisions establish a great deal of skepticism about the reliability and probative value of polygraphs.

framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Id.* at 177. Nor did the Court require special justification in assessing a First Amendment vagueness challenge to a statute that applied to the military. See *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."). Finally, in upholding against Fifth and Sixth Amendment challenges a rule that denied counsel for military personnel in summary courts-martial, the Court in *Middendorf v. Henry*, 425 U.S. 25 (1976), did not discuss—much less require—any particularized explanation differentiating military and civilian proceedings in the promulgation of that Uniform Code of Military Justice rule. See *id.* at 43-45.

Second, respondent argues that the court of appeals is entitled to deference, and not the President. Resp. Br. 46. As Commander in Chief, however, the President has both a constitutional duty and a statutorily delegated authority to establish rules of evidence in military courts-martial. See U.S. Const. Art. II, § 2, Cl. 1; 10 U.S.C. 836(a). As a creation of Congress, the Court of Appeals for the Armed Forces has neither a constitutional nor a statutory role in the promulgation of those rules. Thus, although that court must discharge its responsibility to rule on constitutional challenges to the rules, its finding of unconstitutionality must be reviewed against the backdrop of the judicial deference that "is at its apogee" (*Weiss*,



510 U.S. at 117) when courts review decisions by the political branches in this area.<sup>12</sup>

Finally, respondent argues (Resp. Br. 46) that because "officers are assigned as military judges, circuit defense counsel, and circuit trial counsel whose sole jobs are to try courts-martial throughout the world," there is no continuing merit to this Court's observation two decades ago that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants \* \* \* are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976); see also Gov't Br. 42-43. But the Nation's defense is better served by applying scarce

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<sup>12</sup> *Amicus* Navy-Marine Corps Appellate Defense Division posits that "Congress intended the Court of Appeals for the Armed Forces' decisions to have greater weight than the President's in issues of constitutional law that are intertwined with issues of military justice." *Amicus* Br. 9. There is no support for that assertion. *Amicus* further asserts that this "Court is ill-equipped to perform" an assessment of whether the President's justifications for imposing Mil. R. Evid. 707 "justify the exclusion," because the Court "does not have the knowledge to know if the President is correct because of the intricacies of military discipline and courts-martial." *Amicus* Br. 10-11. From those premises, *amicus* then contends that this Court "should show deference to the lower court's judgment" because Congress entrusted a military court of appeals with the authority to review courts-martial, having divested the President and his military officers of that role. But although Congress created a Court of Appeals for the Armed Forces to hear certain appeals from military disciplinary proceedings, Congress specifically delegated to the President the task of promulgating rules of evidence and procedure in courts-martial. 10 U.S.C. 836(a).

resources to our external foes than to "possibly protracted disputes" (*ibid.*) over whether a polygraph result should be admitted into evidence in any given disciplinary proceeding. An even greater number of specialized military personnel would likely be needed to handle disciplinary matters if respondent's view is to prevail, since the introduction of polygraphs as evidence brings complications to cases that do not exist with Military Rule of Evidence 707 in effect. See Gov't Br. 29-31, 42-43.

If the Sixth Amendment is not offended when the President and Congress determine that counsel is not required at a summary court-martial, *Middendorf*, 425 U.S. at 48, or that a military defendant's access to compulsory process for obtaining evidence may be regulated by the prosecution, *O'Callahan v. Parker*, 395 U.S. 258, 264 n.4 (1969), there is no constitutional infirmity to a Military Rule of Evidence that evenhandedly proscribes the admissibility of polygraph evidence for both the prosecution and defense.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN  
Acting Solicitor General

SEPTEMBER 1997

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No. 96-1133

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1996

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UNITED STATES OF AMERICA, PETITIONER

v.

AIRMAN EDWARD G. SCHEFFER, RESPONDENT

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

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**SUPPLEMENTAL BRIEF FOR THE RESPONDENT**

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## QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgement of military defendants' right to present a defense.



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### SUPPLEMENTAL ARGUMENT

On 30 September 1997, the United States Court of Appeals for the Armed Forces decided the case of *United States v. Bush*, \_ MJ \_ No. 96-1239 (CAAF 30 September 1997) (Appendix). In this case, the United States Court of Appeals for the Armed Forces upholds the United States Air Force's prosecution of Staff Sergeant Bush based on scientific evidence of drug use from mass-spectrometry hair analysis. Slip Op. at 12.

Our research revealed only one other case—an Army court-martial—in which such scientific hair analysis was used in a prosecution for drug offenses. See *United States v. Nimmer*, 43 MJ 252 (1995) (setting aside decision of the United States Army Court of Criminal Appeals and remanding the case for hearing of admissibility of hair-analysis in light of *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); see also *United States v. Medina*, 749 F.Supp. 59, 60 (E.D.N.Y. 1990) (noting radioimmunoassay hair analysis is a “relatively new form of forensic proof not yet recognized by the courts”); *Bush*, Slip Op. at 22.<sup>1</sup> The *Bush* case demonstrates that the United States Air Force is on the leading edge of prosecuting military members by using new and complex scientific evidence, despite the procedural complexities involved in presenting such evidence.

WHEREFORE, the decision of the United States Court of Appeals for the Armed Forces should be affirmed.

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<sup>1</sup>Hair analysis has been proffered as evidence of drug use in settings other than criminal prosecutions. *United States v. Medina*, 749 F.Supp.59 (E.D.N.Y. 1990) (parole revocation hearing); *Nevada Employment Sec. Dept. v. Holmes*, 112 Nev. 275, 914 P2d 611 (Nev 1996) (disqualification for unemployment benefits); *Matter of Adoption of Baby Boy L.*, 157 Misc.2d 353, 596 N.Y.S.2d 997 (N.Y.Fam.Ct. 1997) (adoption hearing); and *Hicks v. City of New York*, 172 Misc.2d 994, 660 N.Y.S.2d 953 (N.Y.sup. 1997) (discharge from employment as new York City police officer).

Respectfully submitted,

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## APPENDIX

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October 1997



**Appendix**

United States, Appellee

v.

Michael W. BUSH, Staff Sergeant  
U.S. Air Force, Appellant

No. 96-1239

Crim. App. No. 31462

United States Court of Appeals for the Armed Forces

Argued May 14, 1997

Decided September 30, 1997

*Counsel*

For Appellant: *Major Kevin P. Koehler* (argued) and  
*Lieutenant Colonel Kim L. Sheffield* (on brief); *Colonel David*  
*W. Madsen*.

For Appellee: *Lieutenant Colonel Michael J. Breslin* (argued);  
*Colonel Theodore J. Fink* (on brief).

Military Judge: William S. Colwell

*Opinion of the Court*

SULLIVAN, Judge:

During July of 1994, appellant was tried by a general court-martial composed of officer members at Andrews Air Force Base, Maryland. Contrary to his pleas, he was found guilty of dereliction of duty by failure to provide a urine sample; and wrongfully using cocaine, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 USC

§§ 892 and 912a, respectively. He was sentenced to a bad-conduct discharge, 45 days' confinement, and reduction in rank to E-1. On January 13, 1995, the convening authority approved the sentence. On June 13, 1996, the Court of Criminal Appeals affirmed. 44 MJ 646.

On January 9, 1997, this Court granted review on the following questions of law:

## I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING THE DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN IMPROPER SEIZURE OF APPELLANT'S HAIR, SINCE OMISSION OF INFORMATION FROM THE AFFIDAVIT TO THE MAGISTRATE UNDERMINED THE MAGISTRATE'S FINDING OF PROBABLE CAUSE TO SEIZE THE HAIR.

## II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING THE DEFENSE MOTION TO DISALLOW INTRODUCTION OF TESTIMONY CONCERNING THE RESULTS OF THE HAIR ANALYSIS TEST CONDUCTED ON APPELLANT'S HAIR, SINCE THE TEST WAS NOT A RELIABLE PROCEDURE AS IMPLEMENTED.

We hold that the military judge did not legally err by admitting hair-analysis evidence in this case. *See generally Ornelas v. United States*, \_\_ U.S. \_\_, 116 S.Ct. 1657 (1996); and *United States v. Nimmer*, 43 MJ 252 (1995).

The Court of Criminal Appeals found the following facts pertinent to this appeal:

On November 15, 1993, appellant was selected to provide a sample for a random drug urinalysis. He showed up at the base theater, as he was directed to do. Thereafter, accompanied by Technical Sergeant (TSgt) Robichaud, the observer, appellant took the sample bottle to the men's room to provide a specimen. A number of irregularities, the significance of which was not then appreciated, ensured. Appellant elected to use a stall, rather than a urinal, complicating Robichaud's observation. He continued to wear his field jacket, and had to be directed by Robichaud to turn slightly so that Robichaud could see him urinate. Even then, as Robichaud later admitted, appellant was positioned in such a way that he did not actually see if appellant urinated, but only that liquid appeared to be filling the bottle. Robichaud, and subsequently the urinalysis monitor, remarked on the clarity of the specimen. However, when asked, appellant explained that he had been drinking a great deal of fluid, and the matter passed. The specimen bottle, which had not left appellant's possession from the time he was given it until he gave it back to the urinalysis monitor, was duly logged, initialed, signed, taped, secured, and mailed to the Armstrong Laboratory at Brooks Air Force Base (AFB) for testing. Once there, one of the laboratory technicians observed that the specimen was colorless, odorless, and did not foam when shaken.

She suspected that a false or adulterated sample had been provided. When a field test

indicated that the specimen was not urine, she sent it to Wilford Hall Medical Center, which confirmed that the specimen was not urine, but some sort of saline solution.

Over defense objection, the government introduced evidence that appellant, a medical technician assigned to the Malcolm Grow Medical Center on Andrews Air Force Base (AFB), had access to intravenous bags containing saline solution, along with surgical tubing and a thumbscrew to control flow from the bags. As well, testimony indicated that appellant was capable of reverse selfcatheterizing, replacing the urine in his bladder with a saline solution. Regardless of the specific mechanism employed, it is clear that appellant did not provide a genuine urine specimen as he was required to do.

On learning of the discrepancy in early December, the base looked into the possibility of testing appellant's hair for the presence of drugs. Special Agent (SA) Toni, of the Air Force Office of Special Investigations (AFOSI), contacted the FBI's forensics laboratory, and was advised that the technology existed to test hair based upon the same biomedical and scientific principles as urinalysis. The advantage, he learned, was that hair potentially would continue to show the presence of cocaine for a period of months after ingestion. The FBI agreed to perform the tests. Using an example borrowed for the AFOSI at Langley AFB, Virginia, SA Toni then prepared an affidavit, stating in pertinent part as follows:

4. . . . As a result of your affiant's training and information gathered from the Federal

Bureau of Investigation (FBI) forensics laboratory, and the Brooks AFB forensics laboratory, your affiant believes trace amounts of drugs may be trapped in the cortex of BUSH's hair [sic] follicles and in his urine. This is based on the following:

a. As blood circulates through the body, it nourishes the hair follicle. If there are drugs in the blood, trace amounts of the drug become entrapped in the core of the hair in amounts roughly proportional to those ingested. These cannot be washed or flushed out, and do not diminish with time. Urine tests can only determine if drugs have been used within the few days prior to providing a sample, however, hair analysis can detect the use of drugs for months, depending on the length of the hair sample.

b. Hair analysis is not subject to false negatives due to temporary abstention or excessive fluid intake. Hair records drug use in a chronological manner and in proportion to the amount consumed. The FBI laboratory can distinguish between heavy, medium, and light drug users.

5. If drug metabolites are present in BUSH's hairs, at a level in excess of 3 ng/mg of hair, it would indicate repeated use of drugs.

6. Based on all the information provided above, your affiant requests authorization to seize approximately 100 hairs and a urine sample from the body of SSgt MICHAEL W. BUSH.



The search authority, Colonel Moore, swore SA Toni to the affidavit and granted authority to seize "approximately, 100 hairs," but did not authorize seizure of appellant's urine. Pursuant to that authority, approximately 100 hairs were cut from the crown of appellant's head. Although never precisely measured, there was a general consensus that appellant's hair was "quite short," and that the hairs measured approximately ½ inch in length. Observing the same chain of custody procedures employed in urinalysis drug testing, the hairs were placed into a bottle, sealed, and sent to the FBI laboratory. By letter of February 28, 1994, the FBI reported that the specimens contained "cocaine and its metabolite, benzoylecgonine at concentrations of 17 and 2.7 nanograms per milligram of hair, respectively."<sup>2</sup>

Based upon this evidence, a general court-martial consisting of members convicted appellant, contrary to his pleas, of dereliction of duty for failure to provide a urine specimen on November 15, 1993, and use of cocaine between on or about November 15, 1993, and January 12, 1994. . . .

\* \* \*

44 MJ at 647-48 (footnote omitted).

<sup>2</sup>Unlike urinalysis, where principally metabolized cocaine (benzoylecgonine) is excreted in urine, unmetabolized cocaine is typically found in hair in five times the amount of its metabolite. According to the testimony of Dr. Donnelly, the government's expert, the 5-1 ratio is typical of actual ingestion, and indeed, "almost precludes any possibility of external contamination." External contamination would yield a much higher ratio. This datum proved significant in the trial itself, as appellant repeatedly suggested that the hair sample might have become contaminated through some kind of passive exposure.

The first question in this case is whether the military judge erroneously denied the defense motion to suppress the Government's evidence of hair analysis because the tested hair was unlawfully seized from appellant. *See generally* Mil.R.Evid. 311(a), Manual for Courts-Martial, United States, 1984. Appellant initially asserts that his hair at the time of its seizure was too short to show drug use at the time he was suspected of using it. Accordingly, he argues that neither the investigating AFOSI agent nor the commander ordering the seizure of his hair could possibly have probable cause to believe evidence of that drug use would still be in his hair. *See generally United States v. Poole*, 30 MJ 271, 275 (CMA 1990) (probable cause may evaporate with the passage of time). He also asserts that the commander who ordered his hair seized on January 12, 1994, was deliberately or recklessly denied material information that would have dissuaded him from ordering that probable-cause seizure. *See generally Franks v. Delaware*, 438 U.S. 154 (1978). He contends that the investigating officer should have particularly informed the commander that his hair's length as of January 12th, the date of the expected seizure, was scientifically insufficient to determine cocaine use on or about November 15, 1993.

Initially, we note that the record does not support appellant's assertion that probable cause had evaporated because his hair was only ½-inch long on January 12, 1994. In fact, the agent testified that he did not know "exactly how long" appellant's head hair or pubic hair was on January 12, 1994. He estimated that "[i]t would have been at least a half inch. It was probably a half inch to an inch" at the time it was seized. The fact that the hair sample seized was ½-inch long does not undermine the investigator's and the commander's practical judgment that a relevant hair sample could still be seized from appellant. *See generally Ornelas*, \_\_ U.S. at \_\_,

116 S.Ct. at 1661 (probable cause is not a legally technical determination but a practicable one).

The initial premise of appellant's second argument is that the investigating police officer was fully aware of the scientific principles upon which hair analysis was based but "deliberately or recklessly" failed to explain those principles to the commander. In addition, he notes that the police investigator did not tell the commander that hair grows  $\frac{1}{2}$  inch per month and at least 1-inch hair would be required on January 12, 1994, to determine whether appellant used drugs on or about November 15, 1993. He notes further that the police investigator failed to inform the commander that appellant's hair on January 12, 1994, was only  $\frac{1}{2}$ -inch long and would only show drug use on or after December 12, 1993. He contends deliberate deception or reckless disregard for the truth existed in this case, not mere negligence. See *Franks, supra* at 170.

We note that the investigating officer in his supporting affidavit did provide a basic explanation of the scientific principles of hair analysis to the commander. Moreover, he specifically advised the commander:

Urine tests can only determine if drugs have been used within the few days prior to providing a sample, however, hair analysis can detect the use of drugs for months, depending on the length of the hair sample.

Finally, although he admitted that he was aware of the  $\frac{1}{2}$ -inch rule at the time of applying for the search authorization, he asserted that he understood that the hair sample could be taken from the head, pubic area, or other part of the body. In this context, appellant's deliberate-or-reckless-omission argument is not well taken. See generally *United States v. Figueroa*, 35 MJ 54, 57 (CMA 1992); *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990).

This is not a case in which the probable-cause determination required precise mathematical measurements implementing a specific scientific formula. As noted in the findings of fact by the military judge, Agent Toni's guidance from the FBI was rather general in nature:

The FBI instructed Agent Toni to obtain the longest hair possible, to cut the hair at the base of the scalp. Agent Toni was not told to obtain a certain or minimum length of hair. The FBI told Agent Toni that hair grows approximately one half inch per month and that drugs could possibly remain in the hair for a period as long as three months, depending on the length of hair sample seized and the growth rate.

Moreover, according to the findings of fact by the military judge, after Agent Toni obtained the search warrant—

Agent Toni subsequently seized about 100 hair samples from the scalp of the accused. The hair was difficult to measure and a measure was not taken after it was cut, because the hair was matted and curly. To the best estimate of Agent Toni, the hair was at least one half inch long to about an inch.

Under these circumstances and in light of the circumstances surrounding the urinalysis which gave rise to the request for a search authorization, it was reasonable for Agent Toni to proceed under the search authorization without applying a precise mathematical limitation to the length of the hair obtained from appellant.

## II

Appellant's basic argument on the second granted issue is that evidence of mass-spectrometry hair analysis was unlawfully admitted at his court-martial to establish his guilt



of using cocaine. Citing the decision of the Navy-Marine Corps Court of Military Review\* in *United States v. Nimmer*, 39 MJ 924 (1994), he argues in his 1997 Final Brief to this Court at 17-18, 24, that such evidence is *per se* inadmissible under Mil.R.Evid. 702. Citing the decision of the Army Court of Criminal Appeals in *United States v. Hill*, 41 MJ 596 (1994), he contends such evidence is not admissible as the sole proof of drug use at a court-martial. Finally, citing the landmark decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), he avers that the military judge abused his discretion in admitting this evidence for the first time in any court in our country.

Appellant first asserts that this Court should decide the question of admissibility of hair-analysis evidence "*de novo*" and ensure "uniform precedent within the federal system regarding the reliability of particular scientific techniques . . . ." Final Brief at 18. He also cites the *Nimmer* decision of the Navy-Marine Corps Court of Military Review and implies that we should follow that court's rejection of hair-analysis evidence ("it lacks the necessary scientific underpinning to reliably be able to detect a one-time use of cocaine . . . ." 39 MJ at 928). Final Brief at 17-18. We reject appellant's invitation to establish a *per se* rule precluding admission of evidence of hair analysis at courts-martial.

The obvious answer to appellant's argument in his 1997 brief is the decision of this Court in *United States v. Nimmer*, 43 MJ 252 (1995). There, this Court set aside the decision of the service appellate court in *Nimmer* and remanded that case for a hearing on admissibility of hair-analysis testimony in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*. The *Nimmer* decision relied on by appellant, therefore, has no precedential value, so there is no reason to follow it in this

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\*See 41 MJ 213, 229 n.\* (1994).

case, especially where a proper *Daubert*-type hearing has been held. In addition, we note that Congress has not provided that this Court make "*de novo*" admissibility determinations on different types of scientific evidence without regard for evidence of record and a military judge's ruling under Mil.R.Evid. 702. See *United States v. Beasley*, 102 F.3d 1440, 1445 (8th Cir. 1996) (Absent judicial notice of reliability of scientific knowledge, *Daubert* hearing will be held.).

We next turn to appellant's argument that hair-analysis evidence is inadmissible if it is used as the sole test to determine cocaine use. Appellant notes evidence in the record that the scientific community only considers hair analysis reliable to corroborate or confirm other evidence of cocaine use. He then cites the Army Court of Criminal Appeals decision in *United States v. Hill*, *supra*, as generally holding that confirmatory testing evidence is inadmissible at courts-martial if no other evidence shows drug use. Finally, he avers that no other evidence of drug use was admitted in his case and, therefore, the military judge legally erred in admitting the hair-analysis evidence of the Government.

We reject this legal argument for several reasons. First, the Army Court of Criminal Appeals in *United States v. Hill*, *supra*, addressed the particular question of admissibility of luminol testing to detect human blood, not hair analysis to detect cocaine or its metabolites. The evidence supporting admission of hair-analysis evidence presented in this case was not before that court, so its decision cannot be considered dispositive of this different question of law. Second, appellant has cited no statute, evidentiary rule, or case law which requires a court to defer to the scientific community's labeling of a test as "confirmatory." We agree with the military judge that Mil.R.Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, give a military judge broad discretion to regulate admission of scientific evidence at



courts-martial with due regard for the advisory opinions of the scientific community. See *United States v. Gipson*, 24 MJ 246, 252 (CMA 1987). Finally, we agree with the Court of Criminal Appeals in this case that other evidence of drug use was admitted which the hair-analysis evidence corroborated. In particular, the appellate court below noted that evidence was admitted that appellant surreptitiously substituted a saline solution for a urine sample on November 15, 1993. See generally 2 Wigmore, *Evidence* § 276 (Chadbourn rev. 1979).

Appellant finally attacks the decision of the military judge admitting the hair-analysis evidence as an abuse of his discretion provided in Mil.R.Evid. 702. See generally *United States v. Houser*, 36 MJ 392, 397 (CMA 1993) (to establish abuse of discretion, "appellant must come 'forward with conclusive argument'"). He contends that proper application of the *Daubert* factors to the evidence in his case would lead to the conclusion that hair-analysis evidence is unreliable and inadmissible. These arguments are essentially the same arguments presented to the military judge at trial to prevent admission of the challenged evidence.

The Eighth Circuit in *Beasley*, 102 F.3d at 1447, recently commented on this type of appellate argument:

In this appeal, Oliver Beasley reasserts his claim that PCR testing does not meet the *Daubert* standard of reliability. He fails, however, to support this claim with any fact-based arguments designed to convince us that any of the District Court's findings concerning the reliability of PCR testing are clearly erroneous. Moreover, he does not contend (nor could he plausibly do so) that the District Court failed to follow the method that *Daubert* prescribes for the judicial assessment of the admissibility of scientific evidence. Instead, in his brief he merely incorporates by reference the

arguments found in his trial counsel's memorandum in support of the motion to exclude the government's DNA evidence. We reject these arguments. First, they are not properly before us; a litigant cannot make arguments on appeal by incorporating by reference into his appellate brief arguments made in written submissions to the trial court. See 8th Cir. R. 28A(j); *Sidebottom v. Delo*, 46 F.3d 744, 750 n.3 (8th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 116 S.Ct. 144, 133 L.Ed.2d 90 (1995). Second, even if these arguments were properly before us, they are not geared to the standard of review, the clear-error standard, that governs our consideration of alleged errors in the trial court's fact-finding. See Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985). These arguments thus would be of no assistance to Beasley in persuading us that the District Court's reliability finding regarding the science of PCR testing is clearly erroneous. . . .

We generally agree with the Eighth Circuit that an appellate court of law is not an appropriate place to relitigate a motion to admit expert testimony under Mil.R.Evid. 702. Therefore, we again reject appellant's invitation to determine *de novo* the reliability of the hair analysis admitted by the judge in this case. See *United States v. St. Jean*, 45 MJ 435, 444 (1996) (recognizing abuse-of-discretion standard). As noted by the First Circuit in *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 15 (1997), a judge's decision on admissibility "is entitled to great deference" and an appellate court "will reverse . . . [his] decision on this question only if (1) the . . . [trial judge] based the decision on an incorrect legal standard, or (2) we have a definite and firm conviction

that the . . . [judge] made a clear error of judgment in the conclusion . . . [he] reached based on a weighing of the relevant factors.” (Internal quotation marks omitted.) See generally *United States v. Houser*, *supra* (conclusive argument of error).

Turning to appellant’s brief, we note that he does not aver that the military judge relied on an incorrect principle of law in deciding to admit the challenged hair-analysis evidence. See generally *United States v. Rouse*, 100 F.3d 560, 568 (8th Cir. 1996). In *United States v. Nimmer*, 43 MJ 252, we remanded the case for a hearing because the military judge did not have the benefit of the *Daubert* decision in determining that hair analysis was inadmissible. Here, individual defense counsel herself called the military judge’s attention to the *Daubert* decision, and the military judge expressly referred to it in his written decision. Accordingly, our sole concern in this case is whether appellant has made a conclusive argument that the military judge made a clear error in this case. We are not so persuaded.

Appellant argues that the military judge made a clear error in judgment in determining from the evidence presented in this case that *Daubert* factors show reliable scientific knowledge was established in this case. He notes the *Daubert* factors and states: “[T]he expert testimony in the present case fails to meet the criteria of even one of these factors.” Final Brief at 19. He then cites evidence of record supporting his arguments on the individual factors and concludes that a finding of reliability was not justified in this case.

In particular, appellant first contends that there was overwhelming evidence presented in this case that mass-spectrometry hair analysis was an untested procedure in detecting drug use. He also contends that there was insufficient evidence of peer review and publication because the only article reviewing the technique was written by the

FBI laboratory who performed the test. He also avers that there was no evidence admitted showing an error rate for the hair-analysis procedure performed in this case. Finally, he asserts that there was “insufficient and incomplete documentation of the procedures” (Final Brief at 31) of hair analysis used in this case.

The Government delineates in particular detail in its Answer to Final Brief the substantial evidence presented by the prosecution on each of the above *Daubert* factors. We agree with its reading of the record. Admittedly, there was disagreement between the experts presented by the parties with respect to some of the *Daubert* considerations. Nevertheless, we concur with the intermediate appellate court’s conclusion that these disputes do not dictate that the evidence of hair analysis be excluded. It said:

That experts might dispute some particularities of the testing protocol or suggest ways that it could have been improved, or that different controls might be used, or that SOFT [Society of Forensic Toxicologists] might harbor policy concerns about the feasibility of hair analysis for workplace testing, or deem it prudent to have independent corroboration of hair analysis, [sic] even considered in the aggregate, are insufficient bases upon which to exclude the results. A vigorous forensic dialogue between both experts was aptly engaged before the triers of fact, who ultimately decided that Dr. Goldberger’s reservations about and disagreements with Dr. Donnelly’s conclusions were insufficient to raise a reasonable doubt that appellant had used cocaine. *Thomas*, 43 MJ [626,] at 633 [(A.F. Ct. Crim. App. 1995)]. Thus, we hold the military judge did not abuse his discretion in denying appellant’s motion in limine and permitting qualitative and

quantitative analysis of appellant's hair to go before the court members.

44 MJ at 652 (footnote omitted). In these circumstances, we have no firm and definite conviction that the military judge erred in determining that the proffered hair-analysis evidence was reliable and relevant in appellant's case. (The detailed ruling of the military judge on admissibility is attached as an appendix.)

### CONCLUSION

In summary, we conclude that the evidence of mass-spectrometry hair analysis proffered in this case was admissible because the hairs analyzed were lawfully seized from appellant with probable cause. *See Ornelas v. United States, supra* (probable cause should be practically, not technically applied). In addition, we conclude that the military judge did not abuse the discretion provided to him under Mil.R.Evid. 702, when based on the record before him, he admitted evidence of hair analysis in this case. *See generally United States v. Nimmer*, 43 MJ 252 (CMA 1995). Such a decision is not unprecedented in Federal law. *See United States v. Medina*, 749 F.Supp. 59 (E.D. NY 1990).

As a postscript, there is some irony to be noted in this case. For years, the military has used urinalysis to prove drug use. *See generally United States v. Ford*, 23 MJ 331 (CMA 1987); *United States v. Murphy*, 23 MJ 310 (CMA 1987); *United States v. Harper*, 22 MJ 157 (CMA 1986). In this case, Staff Sergeant Bush thwarted a urinalysis by surreptitiously substituting a saline solution for a urine sample. The Government now has seized his hair and, by due process, proved drug use. This may be the first drug-use conviction by hair analysis, and it is ironic that Sergeant Bush had a hand in making the Government break new ground in drug detection to catch him.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges GIERKE and EFFRON concur.



DEPARTMENT OF THE AIR FORCE  
USAF TRIAL JUDICIARY, EASTERN CIRCUIT

UNITED STATES

v.

SSGT MICHAEL W. BUSH  
FR247-23-7903  
89th MEDICAL GROUP  
ANDREWS AFB, MD

SUPPLEMENT TO RULING ON MOTION IN LIMINE  
RE: HAIR ANALYSIS  
21 DECEMBER 1994

*BACKGROUND*

The defense made a motion in limine requesting the court to issue an order prohibiting the prosecution from introducing any testimony concerning the results of the hair analysis test conducted on hair samples taken from the body of the accused on 12 Jan 94. The issue before the court was whether the hair test employed by the Federal Bureau of Investigation is an inherently unreliable procedure for purposes of M.R.E. 702 and 403 analysis. During the trial, the Court denied the Defense motion. This analysis supplements the ruling at trial.

*FINDINGS OF FACT*

On or about 15 Nov 93, the accused provided a sample for urinalysis drug testing. The sample was later discovered to be a saline solution, and not urine. After AFOSI investigation, the AFOSI obtained search authority to seize about 100

samples of hair from the accused for testing for drugs. The accused's hair samples were sent to the Federal Bureau of Investigation for hair analysis drug testing and found to contain cocaine.

The DoD uses scientific testing methods at its laboratories for detecting cocaine in human fluid or tissue. The DoD uses radio immunoassay and then gas chromatography/ mass spectrometry. The gas chromatography (GC) identifies the substance, and the mass spectrometry (MS) quantifies the amount of the substance. These testing procedures have been in existence and accepted as reliable for criminal trials for many years.

The FBI uses the MS/MS equipment to test for cocaine. The MS/MS can be used instead of GC/MS, and has the advantages of increased sensitivity. Cocaine and its metabolites can be identified with MS/MS. The MS/MS was designed after and is more advanced than GC/MS machines.

The DoD has established an administrative cutoff for reporting urine samples positive. These administrative cutoffs are higher than what the testing equipment is capable of measuring. The FBI laboratory does not have an administrative cut-off higher than what the testing equipment is capable of measuring, rather, they attempt to identify and measure substances to the technical limits of the machine and operator.

Dr. Donnelly was qualified and accepted as an expert in forensic toxicology and hair analysis. He was the toxicologist who actually tested the accused's hair sample at the FBI Laboratory. His curriculum vitae is at App Ex XXII. He primarily works in the area of toxicology and forensic chemistry and works on hair analysis about 10-15 percent of his time in the lab. He has worked on hair analysis provided by the military, FBI, and other law enforcement agencies for criminal cases. He has testified about hair analysis in military,

federal, and state criminal courts. In all such court cases, he was qualified as an expert witness.

Dr. Donnelly is a member of a committee of the Society of Forensic Toxicology—as is the Defense expert, Dr. Goldberger—to study hair analysis. About June 1994, the committee stated their position that hair testing is a corroborative tool to confirm other evidence of drug abuse.

According to Dr. Donnelly, the committee agreed that such testing was ready to be used in forensic testing. Dr. Donnelly and his lab believe their test procedure can stand on its own and does not need corroboration.

The testing methodology was developed by the director of the chemical toxicology section of the FBI Laboratory, Roger Martz, and has been published and subject to peer review.

Appropriate chain of custody procedures are followed to insure the integrity of the hair sample. The samples are maintained in a secured facility.

Only one sample is tested at a time.

When ready for testing, the hair is briefly washed in methanol to insure removal of any exterior contaminants on the hair. The liquid, after washing, is later tested to see if any contaminants were on the exterior of the hair. This test helps insure that a positive drug test is not caused by external contamination. For the accused's test, the test of the liquid used for the wash showed no evidence of cocaine on the exterior of his hair.

The hair is then placed in another tube and mixed with hot acid to solubilize the drug out of the hair into an acid solution. The hair is extracted with dilute hydrochloric acid for one hour at a temperature of about 40–50 degrees centigrade. A precise amount of deuterated cocaine (introducing the hydrogen isotope that is twice the mass of

ordinary hydrogen that occurs in water), which acts as an internal standard, is added. After extraction with the acid solution, the supernatant is transferred to another tube and extracted for 20 minutes. The organic layer is then removed and dried under a stream of nitrogen, after which the residue is reconstituted with methanol and analyzed via direct probe chemical ionization tandem mass spectrometry. Identification of cocaine is accomplished when the daughter mass spectrum of molecular ion 304 m/z is identified. Quantification of the amount of cocaine is determined through the use of a second tandem mass spectrometric experiment known as the neutral loss of 122 m/z. If for any reason the sample under examination does not result in a full daughter spectrum of cocaine, or a perfect fingerprint, a cocaine identification is not made. The lab has no administrative cutoff level for determining a sample positive.

Under the conditions set for the test, only one chemical in the world will provide that same fragmentary pattern or fingerprint.

The MS/MS procedure has never given the FBI lab a false positive test result.

The lab does not do National Institute on Drug Abuse (NIDA) work and thus is not NIDA certified.

Only several other labs in the country have the MS/MS and perform hair drug analysis tests similar to the FBI, including the Navy and The National Institute of Justice in California.

Dr. Donnelly does not have an administrative cutoff level at which a result would automatically be considered negative. If the full spectrum or full fingerprint of the substance the laboratory is trying to identify is found, it is reported as positive, regardless of the quantity involved. If less than the full fingerprint is found, it is reported as negative.



Mass spectrometry has been available to scientists since the early 1980's. MS is used by drug companies as well as toxicology laboratories for drug identification and analysis. There are only several known laboratories in the United States which use MS/MS, as opposed to GC/MS, which is more widely and commonly used. MS/MS is not widely used, because the equipment is very expensive, about \$500,000 per machine, as compared to GC/MS, about \$50,000 per machine.

Dr. Goldberger, who testified for the defense, was also qualified and accepted as an expert in forensic toxicology and hair analysis. His lab uses the GC/MS procedure. He testified that he wished his lab could afford the top of the line MS/MS equipment. He stated that the MS/MS procedure is not the standard procedure, because most labs don't have that advanced equipment. He stated, "I've never replicated those procedures. I, unfortunately, don't have a MS/MS. . . . I believe that MS/MS is a very acceptable tool, and it's a fascinating tool for drug testing. And he's [Dr. Donnelly] lucky to have one." (ROT 168) Dr. Goldberger believed the MS/MS technique and science was reliable, but he disagreed with the application. (ROT 174, 178)

After hearing the testimony of Dr. Donnelly, it was "very obvious" to Dr. Goldberger how Dr. Donnelly calculated the cocaine concentrations in the accused's hair, even though he still felt Dr. Donnelly's procedure was unconventional. (ROT 170) He agreed that the testing done by Dr. Donnelly showed there was cocaine in the accused's hair. (ROT 179) He disputed the quantitative amount found by the test.

Cocaine was present in the accused's hair. The test only shows that cocaine is located somewhere along the shaft of a hair.

## LEGAL STANDARDS AND ANALYSIS AND APPLICATION TO THE FACTS

The Defense claims the hair analysis procedure offered into evidence is a fundamentally unreliable testing procedure to detect the use of cocaine, and Dr. Donnelly should not be permitted to testify about the hair test. Based on the above listed facts and following legal authorities, the Court finds the hair test is sufficiently reliable, and Dr. Donnelly's testimony is admissible. The hair test can show whether the accused has used a specific illegal drug—in this case cocaine—and a reasonably approximate time period of drug use.

Under the Federal Rules of Evidence, the trial judge must ensure that scientific testimony or evidence is both relevant and reliable before admission into evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). *Daubert*, at 2795, held also that "general acceptance" is not a necessary precondition to admission of scientific evidence under the Federal Rules of Evidence, stating that a "rigid 'general acceptance' requirement for admission of scientific evidence would be at odds with the 'liberal thrust' of the Federal Rules of Evidence and their general approach of relaxing traditional barriers to 'opinion' testimony."

Other courts have found hair testing a reliable procedure. In *U.S. v. Medina*, 749 F.Supp. 59 (E.D.N.Y. 1990), the Court admitted the results of radioimmunoassay (RIA) hair analysis to prove narcotics abuse. The Court found that such testing was sufficiently reliable and had obtained sufficient acceptance in the scientific community to be admissible as evidence. That Court also found that the testing of the hair was performed on a properly obtained sample, was performed using sound laboratory techniques, was performed carefully and accurately, and therefore, the test results were admissible to show that individual ingested narcotics. *Medina*, at 61, cited an extensive list of scientific writings showing RIA hair



analysis was accepted in the field of forensic toxicology when used to determine cocaine use. *Medina*, at 61, also found that although the application of the technique to detect controlled substances was fairly recent, "hair analysis has been used to detect the presence of metals or nutrients for almost twenty years."

Dr. Donnelly has been accepted and has testified as an expert about his lab's hair testing procedure in federal, military, and state criminal courts.

The extensive testimony by Dr. Donnelly and Dr. Goldberger, the Defense expert, shows MS/MS is a reliable scientific test. The Defense expert does not dispute that the test shows cocaine was in the hair sample of the accused; he readily agrees that cocaine was in the hair. The only real dispute about the test process is that Dr. Goldberger doesn't agree on the process to determine the exact quantity of cocaine in the hair.

The MS/MS testing equipment is more advanced and much more expensive than the standard, reliable RIA and GC/MS testing equipment. RIA and GC/MS testing have served as reliable and scientifically accepted testing methods for years to test for drugs in urine. Dr. Goldberger's concerns are that very few people have used MS/MS, as opposed to GC/MS, because of the cost of the machine. Therefore, a large number of scientists have been unable to use and evaluate it. However, he stresses he wishes his lab could afford MS/MS equipment and agrees that the scientific principles behind MS/MS are valid concepts.

The preponderance of the evidence clearly shows that MS/MS is a reliable, valid, and scientifically accepted testing method. This Court finds it sufficiently reliable that it can stand on its own to show whether an accused used cocaine. The Court finds no requirement that the MS/MS test may only

be admitted if supported by other evidence that corroborates the test—such as a positive urinalysis test.

The Court did not consider nor was influenced in this ruling by the information that the accused tested positive for cocaine on several urinalysis tests subsequent to the test of his hair. See ROT 57-58.

The testimony of Dr. Donnelly meets the requirements of M.R.E. 702, which allows testimony by experts if their specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. See *U.S. v. Gipson*, 24 M.J. 246 (CMA 1987). His testimony addresses the critical issue of whether the accused used cocaine, and is certainly relevant under M.R.E. 401. The Court also finds that the probative value of the evidence outweighs the danger of prejudice under M.R.E. 403 and admitting the evidence will not overwhelm, confuse, or mislead the jury.

#### DECISION

The defense motion in limine is denied.

WILLIAM S. COLWELL, Colonel, USAF  
Military Judge

Appellate  
Exhibit LI

CRAWFORD, Judge (dissenting):

### FACTS

On November 15, 1993, appellant was selected to provide a urine specimen for a random drug-urinalysis test. After appellant provided the sample, the observer, Technical Sergeant Robichaud, noticed that the liquid was relatively clear. Nonetheless, the bottle was sent to the laboratory. On December 1, 1993, test results suggested that the sample was probably a saline solution. Because of the lapse of time, Office of Special Investigations (OSI) agents thought probable cause was lacking to request another urine sample. Special Agent (SA) David Toni interviewed appellant, who denied submitting a false urine sample. An interview with co-workers produced no evidence that appellant had taken illegal drugs.

As an alternative, SA Toni considered testing appellant's hair samples for drug residue, which could indicate appellant used drugs around November 15, 1993. When SA Toni talked to personnel at the FBI laboratory about hair samples, he was informed that hair grows approximately half an inch per month.

SA Toni then sought a search warrant from the base commander, Colonel Moore. On January 12, 1994, SA Toni submitted an affidavit to Col. Moore in order to obtain the hair sample. The affidavit stated that appellant worked in emergency medical services and had access to saline solution and a dispensing apparatus. Based on this information plus the information concerning the prior urinalysis test, the commander granted SA Toni permission to seize 100 hair samples from appellant's scalp. However, the affidavit made no mention of the amount hair grows per month.

At trial, Dr. Donnelly of the FBI Laboratory, who performed the hair analysis, testified that appellant's hair samples were approximately half an inch in length<sup>1</sup> and established that appellant had "consumed cocaine" because the hair contained 17 nanograms of cocaine per milligram of hair, and 2.7 nanograms of benzoylecgonine per milligram of hair. Appellant sought unsuccessfully to suppress the evidence concerning testing of the hair.

The defense argues that there could not be probable cause to search appellant's hair in January if hair grows half an inch per month. Thus, probable cause to make the seizure would only have existed between November 15 and December 15.

The Government argues that if the agent was incorrect in not informing the magistrate as to the rate of hair growth, the good-faith exception should be applied. The Government notes that the agents did not consider the hair-growth rate when they obtained the warrant.

### DISCUSSION

As with many constitutional issues, there is a fundamental structure to doctrinal analysis when examining Fourth Amendment issues. That analysis examines Fourth Amendment coverage<sup>2</sup> and protection.<sup>3</sup> Coverage exists when

<sup>1</sup>Although never precisely measured, there was a general consensus that appellant's hair was 'quite short,' and that the hairs measured approximately ½ inch in length." 44 MJ 646, 648 (1996).

<sup>2</sup>*United States v. Taylor*, 41 MJ 168, 170 (CMA 1994) ("Mil.R.Evid. 311 through 317, like the decisions of the Supreme Court, divide Fourth Amendment issues between coverage (that is, when the Fourth Amendment is applicable) and protections.")

In *United States v. Muniz*, 23 MJ 201, 206-07 (CMA 1987), then-Judge Cox wrote the following:



there is a right to privacy against government agents<sup>4</sup> using any of their senses or mechanical equipment to "observe"<sup>5</sup> areas that are normally considered "private"<sup>6</sup> or interfere with the freedom of movement of a person.<sup>7</sup> Taking blood from an

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The Fourth Amendment consists of two main components. The first part refers to the right of the people to be free of unreasonable searches. The second part discusses the circumstances under which warrants may issue. The interrelationship between the two parts has historically been expressed in terms such that searches without a valid warrant are unreasonable, unless they fall within one of the recognized exceptions to the warrant requirement; and the burden is on the Government to show that the search fits within an exception.

<sup>3</sup>In *United States v. Rivera*, 10 MJ 55, 57-58 (CMA 1980), the Court reiterated:

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 US 347, 357 [ , 88 S.Ct. 507, 19 L.Ed.2d 576)] (1967)(footnotes omitted). One well-recognized exception to the requirement that a magistrate or judicial officer must authorize certain searches is found in the military practice permitting commanding officers or their delegates to authorize searches upon probable cause.

<sup>4</sup>See Mil.R.Evid. 311(c), Manual for Courts-Martial, United States (1995 ed.).

<sup>5</sup>This term encompasses all five senses.

<sup>6</sup>There is a right to privacy when there is both a subjectively and an objectively reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. (concurring)).

<sup>7</sup>*United States v. Mendenhall*, 446 U.S. 544 (1980). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

individual<sup>8</sup> or obtaining fingernail scrapings<sup>9</sup> constitutes a Fourth Amendment search. Once it is determined that coverage exists, the next issue is whether there was a violation of Fourth Amendment protections under the warrant requirement or under one of the specifically limited exceptions to the warrant requirement.<sup>10</sup>

The equivalent of a warrant in the military is an authorization by a commander.<sup>11</sup> Such authorization must satisfy the probable-cause<sup>12</sup> and specificity<sup>13</sup> requirements of the Fourth Amendment. The military, unlike some states, does not have a statute addressing how to obtain and identify physical characteristics of a suspect.<sup>14</sup> Thus, this Court must resort to general Fourth Amendment principles. To obtain hair samples from an individual requires reasonable grounds to believe that the hair would assist in a criminal prosecution.<sup>15</sup> The officer's actions may fill in any insufficiency in the authorization.<sup>16</sup> In this instance the search authorization did not designate whether the hair sample should be head hair, body hair, or genital hair. The officer's action will fill in the

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<sup>8</sup>*Schmerber v. California*, 384 U.S. 757 (1966).

<sup>9</sup>*Cupp v. Murphy*, 412 U.S. 291 (1973).

<sup>10</sup>*United States v. Morris*, 28 MJ 8, 15 (CMA 1989); *United States v. Rivera*, 10 MJ 55, 57 (CMA 1980); see also Mil.R.Evid. 315(g).

<sup>11</sup>Mil.R.Evid. 315(d)

<sup>12</sup>Mil.R.Evid. 315(f)

<sup>13</sup>Mil.R.Evid. 315(b)(1).

<sup>14</sup>See, e.g., § 13-3905, Ariz. Rev. Stat.; Vt.R.Crim.P. 41.1.

<sup>15</sup>Mil.R.Evid. 315(f)

<sup>16</sup>*United States v. Cunningham*, 113 F. 3d 289 (1st Cir. 1997)(holding officer's knowledge satisfied specificity requirement); see *United States v. Brown*, 49 F.3d 1162, 1169 (6th Cir. 1995) (holding that executing officer's knowledge "may cure" insufficiencies in warrant).



lack of specificity.<sup>17</sup> After the warrant was obtained, SA Toni focused on head hair. He asked Sergeant Carpenter to obtain approximately 100 hair samples from the crown of appellant's head.

In his affidavit, SA Toni did not tell Col. Moore that appellant's hair was short and that hair grew ½ inch per month. Hypothetically, let us consider that SA Toni was told by an informant that on November 15 Morgan had drugs in his house. In December, the same informant tells SA Toni that the drugs have been removed and sold. However, in January, when SA Toni seeks the search authorization from the commander, he does not tell the commander that the drugs were removed in December. It is not necessary for appellant to establish "by direct evidence that the affiant makes an omission recklessly. Rather, it is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause, recklessness may be inferred from proof of the omission itself."<sup>18</sup> When there is a reckless omission by a law enforcement officer, the underlying information will be

<sup>17</sup>See n. 15, *supra*.

<sup>18</sup>*Madiwale v. Savaiko*, 117 F.3d 1321, 1327 (11th Cir. 1997), quoting *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (holding that "[a] party need not show by direct evidence that the affiant makes an omission recklessly"); *United States v. McNeese*, 901 F.2d 585, 593, 594 (7th Cir. 1990) (citations omitted) (holding that one, by a preponderance of the evidence, "must offer direct evidence of the affiant's state of mind or inferential evidence that the affiant had obvious reasons for omitting facts in order to prove deliberate falsehood or reckless disregard"); see also *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). Cf. *United States v. Figueroa*, 35 MJ 54, 57 (CMA 1992) ("Even if the omission had been intentional or reckless, its inclusion would not have extinguished probable cause."); but see *United States v. Mankani*, 738 F.2d 538, 546 (2d Cir. 1984) (holding search warrant valid because there was "no direct evidence that omissions, if any, were intentionally or recklessly made").

reevaluated as if the correct information had been given.<sup>19</sup> Had that been done in this case, there would be no probable cause to seize hair from appellant's head on January 12, 1994.

Under the circumstances of this case, there were no grounds to believe that the 100 hair samples obtained from appellant's head would have any evidence that related to submission of a fraudulent urine sample on November 15, 1993.

The Government argues that SA Toni was a new agent and was on probationary status and had no training in obtaining hair analysis. The lack of training is not an excuse for failing to know what probable cause would mean in terms of obtaining hair samples.<sup>20</sup> For the good-faith exception to apply, "[a]t the very least, the officer must be familiar with well-established principles" of probable cause.<sup>21</sup> If one were to excuse SA Toni because of lack of training, such excuses would create incentive not to train officers and would undercut the right of privacy of all servicemembers.

For the reasons stated above, I dissent. I would reverse the decision of the Court of Criminal Appeals.

<sup>19</sup>See *United States v. LaMorie*, 100 F.3d 547, 555 (8th Cir. 1996); *United States v. Kyllo*, 37 F.3d 526 (9th Cir. 1994); see also *Madiwale v. Savaiko*, 117 F.3d 1321 (11th Cir. 1997); *Martinez v. City of Schenectady*, 115 F.3d 111, 115 (2d Cir. 1997); *Sherwood v. Mulvihill*, 113 F.3d 396, 400 (3d Cir. 1997).

<sup>20</sup>*United States v. Lopez*, 35 MJ 35, 42 (CMA 1992).

<sup>21</sup>See n. 20, *supra*.

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No. 96-1133

Supreme Court, U.S.

FILED

JUL 3 1997

CLERK OF THE COURT

In The  
**Supreme Court Of The United States**

October Term, 1996

—◆—  
UNITED STATES OF AMERICA,

*Petitioner,*

v.

AIRMAN EDWARD G. SCHEFFER,

*Respondent.*

—◆—  
ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

—◆—  
BRIEF OF THE STATE OF CONNECTICUT AND  
27 STATES AS AMICI CURIAE  
IN SUPPORT OF PETITIONER

—◆—  
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No. 96-1133

In The  
**Supreme Court Of The United States**  
October Term, 1996

UNITED STATES OF AMERICA,  
*Petitioner,*

v.

AIRMAN EDWARD G. SCHEFFER,  
*Respondent.*

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

**BRIEF OF THE STATE OF CONNECTICUT AND  
27 STATES AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

## INTEREST OF THE AMICI CURIAE

The amici States seek reversal of the decision of the United States Court of Appeals for the Armed Services in *United States v. Scheffer*, 44 M.J. 442 (1996), which has been granted review by this Court. In holding that Military Rule of Evidence 707, barring use of polygraph evidence, violated the defendant's right to present a defense, the Court of Appeals misinterpreted and misapplied this Court's case law construing the right to present a defense. Because Rule 707 is analogous to the rules in many States barring the use of polygraph evidence in trial court proceedings, this Court's opinion in *Scheffer* will directly affect the validity of those rules. The amici States share a concern that the constitutional analysis embodied in *Scheffer*, if adopted by this Court, would have a significant and detrimental effect on the administration of criminal justice. Adoption of the *Scheffer* holding would constitute an unwarranted intrusion into the authority of state courts and legislatures to adopt the rules of evidence that will apply in their trial courts.

The admissibility of polygraph evidence has been considered by almost every State's appellate courts. In many States, reviewing courts have considered and rejected constitutional challenges to the exclusion of polygraph evidence. Adoption of the *Scheffer* holding would obliterate the years of experience that the States have had with this type of evidence and force them to abandon their well-developed policy considerations for excluding it. The experience of the States, as well as the policy reasons underlying their decisions to bar the use of such evidence, can and should inform this Court's consideration of the issue.

For these reasons, the amici States support Petitioner in seeking reversal of the judgment of the Court of Appeals.

## SUMMARY OF ARGUMENT

The decision of the majority of States to bar the use of polygraph evidence is constitutionally sound because it is based on legitimate conclusions that such evidence is unreliable and overly prejudicial. The exclusion is based on conclusions that: the interpretation of polygraph tests is too subjective and the validity of test results has not been established; trial court resources that must be utilized to address and supervise such evidence render it too burdensome; and there is grave danger that polygraph evidence usurps the function of the jury to assess credibility. The right to present a defense must bow to the exclusion of polygraph evidence, because the exclusion is based on important interests in the administration of criminal law and procedure.

## ARGUMENT

### I. THE STATES' RULES EXCLUDING POLYGRAPH EVIDENCE IN TRIAL COURT PROCEEDINGS SUBJECT TO THE RULES OF EVIDENCE ARE COMMENSURATE WITH CONSTITUTIONAL PRINCIPLES

In *Scheffer*, the Court of Appeals held that Military Rule of Evidence 707's *per se* exclusion of polygraph evidence is unconstitutional, in that it violates a defendant's right to present a defense. The majority of States have an analogous exclusion of polygraph evidence.<sup>1</sup>

<sup>1</sup> See *Pulakis v. State*, 476 P.2d 474 (Alaska 1970); *Haakanson v. State*, 760 P.2d 1030 (Alaska App. 1988); *People v. Anderson*, 637 P.2d 354 (Colo. 1981) (en banc); *State v. Porter*, 241 Conn. 57, 1997 WL 265202 (released May 20, 1997); *State v. Okamura*, 78 Haw. 383, 894 P.2d 80 (1995); *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996); *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991); *State v. Harnish*, 560 A.2d 5 (Me. 1989); *State v. Casale*, 110 A.2d 588 (Me. 1954); *State v. Hawkins*, 326 Md. 270, 604 A.2d 489 (1992); *Commonwealth v. Mendes*, 406 Mass. 201, 547 N.E.2d 35 (1989); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *State v. Anderson*, 379 N.W.2d 70 (Minn. 1985), cert. denied, 476 U.S. 1141 (1986); *State v. Biddle*, 599 S.W.2d 182 (Mo. 1980); *State v. Staat*, 248 Mont. 291, 811 P.2d 1261 (1991); *State v. Steinmark*, 195 Neb. 545, 239 N.W.2d 495 (1976); *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456 (1993); *State v. Ober*, 126 N.H. 471, 493 A.2d 493 (1985); *People v. Angelo*, 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996); *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *Fulton v. State*, 541 P.2d 871 (Okla. Crim. App. 1975); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984); *Commonwealth v. Brockington*, 500 Pa. 216, 455 A.2d 627 (1983); *In Re Odell*, 672 A.2d 457 (R.I. 1996); *State v. Dery*, 545 A.2d 1014 (R.I. 1988); *State v. Muetze*, 368 N.W.2d 575 (S.D. 1985); *Grant v. State*, 374 S.W.2d 391 (Tenn. 1961); *State v. Hart*, 911 S.W.2d 371 (Tenn.App. 1995); *Perkins v. State*, 902 S.W.2d 88 (Tex. App. 1995); *State v. Hamlin*, 146 Vt. 97, 499 A.2d 45 (continued...)

<sup>1</sup>(...continued)

(1985); *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159 (1986); *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995); *State v. Dean*, 307 N.W.2d 628 (Wisc. 1981). The District of Columbia also bars the use of polygraph evidence. *Contee v. United States*, 667 A.2d 103, 104 (D.C. 1995).

Some States admit polygraph evidence only by stipulation of the parties. See *Ex Parte Clements*, 447 So.2d 695 (Ala. 1984); *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); *Holcomb v. State*, 268 Ark. 138, 594 S.W.2d 22 (1980), Ark. Code Ann. §12-12-704 (Repl. 1995); *People v. Fudge*, 7 Cal. 4th 1075, 875 P.2d 36, 31 Cal. Rptr. 2d 321 (1994), cert. denied, 115 S.Ct. 1367 (1995); Calif. Evid. Code §351.1 (Deering 1986); *Melvin v. State*, 606 A.2d 69 (Del. 1992); *Delap v. State*, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984); *Fargason v. State*, 266 Ga. 463, 467 S.E.2d 553 (1996); *State v. Fain*, 116 Idaho 82, 774 P.2d 252, cert. denied, 493 U.S. 917 (1989); *Sanchez v. State*, 675 N.E.2d 306 (Ind. 1996); *State v. Losee*, 354 N.W.2d 239, (Iowa 1984); *State v. Weber*, 260 Kan. 263, 918 P.2d 609 (1996); *Kazalyn v. State*, 825 P.2d 578 (Nev. 1992); *State v. McDavitt*, 62 N.J. 36, 297 A.2d 849 (1972); *City of Bismarck v. Berger*, 465 N.W.2d 480 (N.D. 1991); *State v. Souel*, 53 Ohio 2d 123, 372 N.E.2d 1318 (1978); *State v. Crosby*, 927 P.2d 638 (Utah 1996); *State v. Renfro*, 96 Wash. 2d 902, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982); *Schmunk v. State*, 714 P.2d 724 (Wyo. 1986).

A few states allow polygraph evidence to be admitted in certain proceedings. See *State v. Catanese*, 368 So.2d 975 (La. 1979) (post-trial proceedings); *State v. Wright*, 471 S.E.2d 700 (S.C. 1996) (at discretion of trial judge but generally should be excluded).

Mississippi and New Mexico allow admission of polygraph evidence, with restrictions, during a trial. *Connor v. State*, 632 So.2d 1239 (Miss. 1993) (admissible to rehabilitate impeached witness); *State v. Sanders*, 872 P.2d 870 (N.M. 1994) (admission authorized by N. M. Stat. Ann. §11-707).



**A. States May Exclude Irrelevant, Unreliable Or Overly Prejudicial Evidence Without Infringing On A Defendant's Right To Present A Defense**

The Due Process Clause limits the ability of the States to exclude evidence only when the exclusion "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977).

In determining whether a "fundamental" principle is at issue, a reviewing court looks primarily to the historical, uniform and continuing acceptance of the principle by the states. *Montana v. Egelhoff*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996). Where the experience of the States has led to justifiable policy decisions regarding the exclusion of evidence, Due Process is not violated. "So long as the category of excluded evidence is selected on a basis that has good and traditional policy support, it ought to be valid." *Id.* at 2017 n.1. Where the reviewing court finds such justifiable and well-established reasons for the exclusion of evidence, it should conclude that the challenged statute or rule is constitutionally sound. *Id.* at 2020-2021.

The States, as well as the federal government, may require that, to be admissible at a trial, evidence not only be relevant but also reliable. Such a restriction does not impermissibly infringe on the right to present a defense.<sup>2</sup> "The accused does not have an unfettered right to offer

<sup>2</sup> The constitutional right to present a defense is not absolute. *Montana v. Egelhoff*, 116 S.Ct. at 2017. The right "'may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). Thus a criminal defendant may be compelled to comply with established rules governing the presentation of evidence in trial court proceedings. See *Chambers v. Mississippi*, 93 S.Ct. at 1049 (presentation of evidence is subject to compliance with "established rules of procedure and evidence"). Cf. *Cooper v. Oklahoma*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1373, 134 L.Ed.2d 138 (1996) (due process violation where rule had no common law roots and only four states had adopted it).

The fact that evidence possesses bare probative value does not guarantee its admissibility. MCCORMICK ON EVIDENCE, VOL. I, §185, p. 779 (4TH ED. 1992). The common law authority of a court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" is codified in Rule 403 of the Federal and Uniform Rules of Evidence, and in the evidence codes and case law of every State.<sup>3</sup>

<sup>3</sup> Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

At least thirty-five states have adopted codes of evidence analogous or identical to the Federal Rules of Evidence. See E. IMWINKELREID, "A BRIEF DEFENSE OF THE SUPREME COURT'S APPROACH TO THE INTERPRETATION OF THE FEDERAL RULES OF EVIDENCE," 27 IND. L. REV. 267, 267 n.5 (1993).

The traditional balancing of probative value and prejudicial impact focuses the court on the actual usefulness of the proffered evidence in the trial process. The balancing test necessarily embodies policies at the heart of trial court administration. To the extent that evidence may confuse, distract, mislead or overly influence the jury, the trial court may keep it out. Courts are particularly alert to these concerns when the evidence has the potential to intrude into the jury's primary task, which is to resolve credibility issues and the disputed historical facts of the case. See, Section I.D, *infra*.

To minimize the risk that the jury will be deterred from its primary task, courts often limit the admissibility of evidence directly addressing a witness' credibility. An example of such a limitation is the well-established rule against "bolstering" a witness' testimony until after credibility has been challenged. See MCCORMICK ON EVIDENCE, VOL. I, 47, P. 174 (4TH ED. 1992).

Another example of the legitimate exclusion of a category of evidence is embodied in Rule 608(a) of the Federal and Uniform Rules of Evidence, which precludes opinion testimony about an individual's credibility on a specific issue or a particular occasion.<sup>4</sup>

Hearsay rules also preclude the introduction of testimony that, while relevant, is not deemed sufficiently

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<sup>4</sup> Federal Rule of Evidence 608(a) provides in relevant part: (a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness . . .

reliable for consideration by the factfinder. See *Montana v. Egelhoff*, 116 S.Ct. at 2017 (discussing validity of evidentiary rules of exclusion).<sup>5</sup>

States that have adhered to an absolute bar against the admissibility of polygraph evidence have concluded that exclusion is proper because whatever probative value the evidence possesses is outweighed by its prejudicial impact. See text, *infra*. Because the exclusion of polygraph evidence is based on legitimate concerns about its adverse effect on the trial process, it does not impermissibly limit the right to present a defense.

Of course, States may not apply rules of evidence in a manner that violates a defendant's constitutional rights. Amici States agree with Petitioner, however, that a rule excluding polygraph evidence does not in any way restrict a defendant's right or ability to testify, *Rock v. Arkansas*, *supra*; or prevent a defendant from presenting favorable witnesses, *Chambers v. Mississippi*, *supra*. The *per se* exclusion of polygraph evidence is based on the principles of law discussed in this Section, and on the compelling policy

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<sup>5</sup> Other exclusionary rules may be found in the limitations on testimony about syndromes such as rape trauma syndrome, post-traumatic stress disorder, and battered spouse syndrome. While experts may testify about the typical behavior patterns exhibited by persons with these disorders, they are usually precluded from testifying that a particular individual actually suffers or does not suffer from those disorders. See e.g., *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989) (where defendant raised self-defense claim and presented expert testimony explaining battered women's syndrome, jury could utilize expert's testimony to assess how "a reasonably prudent battered woman" would have reacted). See also *Arcoren v. United States*, 929 F.2d 1235, 1241 (8th Cir. 1991) (expert's testimony on battered woman's syndrome did not impinge on jury's role in determining credibility, where expert expressed no opinion on whether witness actually suffered from that disorder).



considerations which are discussed in Sections I.B through I.D, *infra*. Therefore the States' enforcement of a rule against the admissibility of polygraph evidence is constitutionally sound.<sup>6</sup>

**B. State Courts Recognize That The Validity of Polygraph Test Results Has Not Been Established**

There is significant disagreement among experts about the validity, or accuracy, of the results obtained in a polygraph examination. See MCCORMICK ON EVIDENCE, VOL. I, § 206, PP. 907-917 (4TH ED. 1992); UNITED STATES CONGRESS, OFFICE OF TECHNOLOGICAL ASSESSMENT, "SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION - A TECHNICAL MEMORANDUM," AT 4, 52, 96-97 (1983) (hereinafter OTA

<sup>6</sup> State courts have considered and rejected constitutional challenges to the exclusion of polygraph evidence. See, e.g., *Haakanson v. State*, 760 P.2d at 1033 n.3 (distinguishing *Rock v. Arkansas*); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996) (distinguishing *Rock v. Arkansas*); *People v. Fudge*, 7 Cal.4th at 1122-23 (no due process violation); *State v. Porter*, 241 Conn. at 133-34 (no sixth amendment or due process violation); *Paxton v. State*, 867 P.2d 1309, 1323-24 (Okla. Cr. App. 1993) (no violation of right to testify or to present a defense); *Perkins v. State*, 902 S.W.2d at 94 (no sixth amendment or due process violation); *State v. Ahlfinger*, 749 P.2d 190 (Wash. App. 1988) (distinguishing *Rock v. Arkansas*).

Memo) (polygraph reliability unproven and in dispute).<sup>7</sup> See generally, *State v. Porter*, 241 Conn. at 104-113.

Polygraphs are dissimilar to other kinds of scientific evidence such as fingerprint analysis, ballistic examination, blood typing, and DNA typing which are objectively and mechanically quantifiable by tests of recognized validity. Empirical studies and laboratory simulation studies attempting to demonstrate the accuracy of polygraph tests have serious methodological weaknesses that undermine the validity of their data. See generally, *State v. Porter*, 241 Conn. at 104-109 (discussing studies).

Unlike standard medical or scientific tests, there is no definitive method by which to examine polygraph results as a means of verifying them. OTA Memo at 7-8 (polygraph research difficult to design and conduct; accuracy obtained in one situation may not generalize to others). Thus it is difficult if not impossible to assess accurately the actual probative value of polygraph tests. *State v. Porter, supra*; see *Pulakis v. State*, 476 P.2d 474 (Alaska 1970) (polygraph proponents have not yet developed persuasive data demonstrating reliability).

Unlike standard medical or scientific test results which measure objective data, the interpretation of polygraph tests is replete with subjectivity. While the polygraph

<sup>7</sup> The OTA study concluded that a polygraph detects deception "better than chance," but with error rates that could be considered "high" or "significant." OTA Memo at 52, 97. The term "validity" refers to a test's accuracy -- its actual ability to do what it says it does. MCCORMICK ON EVIDENCE, VOL. I, §204, P. 877 N. 51 (4TH ED. 1992). By contrast, "reliability" refers to the reproducibility, or consistency, of results. OTA Memo at 50. In the polygraph context, "reliability is important, but the polygraph debate really centers around the test's validity" i.e., its actual ability to detect deception. *State v. Porter*, 241 Conn. at 104 and n. 46.



machine measures and records a subject's physical responses during a question and answer session, the instrument itself cannot detect deception. OTA Memo at 6, 11. The measurements must be interpreted by the polygraph examiner, who attempts to draw a correlation between the physiological data and the presence or absence of deception in the subject. The interpretations of the polygraph's measurements by the examiner form the crux of the results of such a test. In fact, "the single most important variable affecting the accuracy of the polygraph test result [is] the polygraph examiner." *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323-1324 (1978); accord, *State v. Grier*, 307 N.C. at 635; *People v. Anderson*, 637 P.2d at 361; see M. ABELL, "POLYGRAPH EVIDENCE: THE CASE AGAINST ADMISSIBILITY IN FEDERAL CRIMINAL TRIALS," 15 AM. CRIM. L. REV. 29, 41 (1977) (polygraphs lack the reliability of objective forensic tests due to subjective nature of interpretation).

A polygraph examiner purports to ascertain a subject's veracity indirectly, through interpretations of the measurements of physiological data exhibited during the subject's response to a series of questions. The questions are created by the examiner for each individual test and thus may be crafted (by the examiner or those arranging for the test) to achieve a desired result. Moreover, a pretest may be administered, or the testing procedure may be explained in advance to the subject. Intended or not, such interventions may skew the results.

Polygraph examiners who administer the test are required in many States to obtain a license, but, while there are more than thirty schools offering training courses ranging from seven to fourteen weeks, there are no uniform standards for training examiners and no uniform test procedures. See *State v. Porter*, 241 Conn. at 97-103 (types of tests); *Haakanson v. State*, 760 P.2d at 1034 (polygraph

examiner not member of relevant scientific community, but rather a technician or operator); OTA Memo at 83-84; N. ANSLEY & L. BEAUMONT, QUICK REFERENCE GUIDE TO POLYGRAPH ADMISSIBILITY, LICENSING LAWS, AND LIMITING LAWS (16TH ED. 1992). It is acknowledged in the literature that a substantial number of examiners may lack adequate training and competence. See e.g., D. RASKIN, "THE POLYGRAPH IN 1986: PROFESSIONAL AND LEGAL ISSUES SURROUNDING APPLICATION AND ACCEPTANCE OF POLYGRAPH EVIDENCE," 1986 UTAH L.REV. 29, 66-67 (1986).

Nevertheless, it is possible that even an inadequately trained examiner may reach an accurate conclusion about the veracity of a particular subject. But it cannot yet be demonstrated that the accuracy of that conclusion derives from the polygraph instrument, as opposed to chance or to the examiner's own subjective perceptions and impressions of the subject. See D. CARROLL, "HOW ACCURATE IS POLYGRAPH LIE DETECTION?" IN THE POLYGRAPH TEST: LIES, TRUTH AND SCIENCE, (A. GALE ED. 1988) at pp. 19, 28. However, if the examiner's opinion about veracity was not based on objective, scientific principles, then it should not be admitted. *State v. Porter*, 241 Conn. at 120.

Another concern about reliability arises from the existence of countermeasures that subjects can learn and utilize to undermine whatever accuracy the polygraph test might possess. In *State v. Dery*, the Rhode Island Supreme Court described an expert's testimony about countermeasures by which a subject could deceive the polygraph examiner. 545 A.2d at 1016. These methods include tightening of muscles such as sphincters, squeezing one's toes, taking certain drugs or controlling one's thoughts to promote relaxation. The expert testified that even experienced polygraph examiners were unable to detect such countermeasures. *Id.* See *State v. Porter*, 241 Conn. at 113-114 (in all studies, more than fifty per cent of the

examiners' conclusions about subjects who had received countermeasure instruction were incorrect); *United States v. Piccinonna*, 885 F.2d 1520, 1538 n.3 (11th Cir. 1989) (Johnson, J. dissenting) (CITING GUDJONSSON, "HOW TO DEFEAT THE POLYGRAPH TEST" IN THE POLYGRAPH TEST: LIES, TRUTH AND SCIENCE (A GALE ED. 1988)); OTA Memo at 88 (test measurements can be affected through drug usage by subject and pressing toes against floor); D. LYKKEN, "THE VALIDITY OF TESTS: CAVEAT EMPTOR," 27 JURIMETRICS J. 263, 267 (1987) ("[T]here is a simple, easily learned technique with which a guilty person can 'beat' the control question test"). There exists a real possibility that, if polygraphs were routinely admissible in court, such countermeasures will become widely utilized.<sup>8</sup>

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<sup>8</sup> In *State v. Porter*, the Connecticut Supreme Court questioned whether training in countermeasures is difficult to obtain, and, if so, "whether it would remain the case if polygraph examination of witnesses became common, especially given the apparent brevity and simplicity of the training in question." *State v. Porter*, 241 Conn. at 114.

A recent foray into the Internet via AmericaOnLine using the search word "polygraph" resulted in 2100 entries, including one entitled "How To Beat A Lie Detector") <http://members.aol.com/revenantpr/Impaler/lie.htm>. After briefly describing the type of questions involved in a polygraph examination, the creator of this site advises that a subject's goal should be to cause stress during the "control" questions by flexing one's biceps or holding one's breath, thus skewing the examiner's comparison with responses to the "relevant" questions on the test.

Another entry, entitled "How To Sting The Polygraph", was found at <http://www.polygraph.com>. The creator of this site offers to send the reader a handbook on countermeasures at the price of forty dollars.

While the actual validity of the information offered by these particular sites is open to question, their very existence and availability indicates that a nascent cottage industry may be developing for such training.

Considered separately or together, the foregoing concerns about the polygraph's validity should inform any determination about admissibility or exclusion. "[A]lthough the probative value of the polygraph test may be greater than a coin toss, it is not significantly greater, especially for failed tests." *State v. Porter*, 241 Conn. at 112.<sup>9</sup> Until methodology and technique are improved, procedures are standardized, uniform qualifications for examiners are adopted, and the test is insulated against countermeasures, the validity of polygraph results remains highly questionable. Lack of proven validity therefore provides a legitimate ground for the *per se* exclusion of polygraph evidence.<sup>10</sup>

### C. The States' Experience Has Confirmed The Significant Potential For Undue Delay And Court Congestion In The Absence Of A *Per Se* Rule Of Exclusion

If polygraph evidence were admissible, trial time would lengthen because in each individual case a trial court would have to hold a hearing on the validity of the test, the testing procedures utilized, the qualifications of the

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<sup>9</sup> The Supreme Court of Washington, in allowing the admission of polygraph evidence by stipulation, points out that the parties, "knowing that the degree of reliability is open to question, in effect gamble that the test will prove favorable to them. . . . The parties . . . by their stipulation waived any question as to the degree of the reliability of the polygraph." *State v. Renfro*, 96 Wash.2d 902, 906, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982).

<sup>10</sup> In *State v. Porter*, the Connecticut Supreme Court acknowledged that "lie detection technology continues to evolve," and indicated that, if presented at some future date with evidence indicating that "lie detection technique has reached a sufficiently high level of validity that the probative value of such evidence potentially outweighs its prejudicial impact," the Court would revisit the issue. 241 Conn. at 136.



examiner, the conditions under which the test was administered, and the content of the questions asked of the subject during the test. Thus evidentiary hearings for the admissibility of particular polygraph test results are likely to require even more time than for standard scientific evidence.

With standard scientific and medical evidence, there are recognized, established tests and procedures that are accepted as providing accurate results. At a typical hearing on the admissibility of scientific evidence, the expert testifies about whether those established procedures were properly performed and about the results they yield.

Polygraph evidence is different. Because of the lack of standardization, the validity of the test instruments and the test procedures will have to be examined in each case. Moreover, the qualifications of each polygraph examiner will almost certainly be challenged because of the lack of uniform standards and the questionable adequacy of training in the field. See Section I.B, *supra*. Because the test questions are crafted for each individual test, challenges to the formulation, order and content of those questions are almost inevitable in every case. Because the validity of the test, and not just the testing procedures, will be an issue every time, evidentiary hearings could degenerate into time-consuming battles of opposing experts. Finally, because of the individual content and subjective interpretation of polygraph tests, the length of evidentiary hearings will not likely decrease even as courts become more familiar with proffers of polygraph evidence over time.

Several States experimented with admitting polygraph evidence before reverting to a *per se* rule of exclusion. See *Commonwealth v. Mendes*, 406 Mass. 201, 547 N.E. 2d 35 (1989); *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *State v. Dean*, 103 Wis.2d 228, 307 N.W.2d 628 (1981); *Fulton v. State*, 541 P.2d 871, 872 (Okla. 1975). Their experience supports the conclusion that the investment

of time and trial court resources required to determine admissibility is not warranted where the probative value of polygraph evidence is minimal or dubious, and the prejudicial impact is high.

In *Mendes*, Massachusetts ended a fifteen year experiment with admitting polygraph evidence, pointing to the subjective nature of the testing; its uncertain validity; the dangers of confusing the jury and usurping its role; and the continued burden on trial courts to conduct lengthy evidentiary hearings. 406 Mass. at 211.<sup>11</sup> "Fifteen years has been more than enough time for examination and evaluation. . . . Further hope or expectation . . . is no longer warranted. . . . Accordingly, supported by the overwhelming authority throughout the country, we announce that polygraphic evidence, with or without pretest stipulation, is inadmissible in criminal trials in this Commonwealth." *Id.* at 212.

In *Grier*, the North Carolina Supreme Court reinstated its *per se* rule of exclusion, saying, "[T]he administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered. If a trial court were to adequately police the reliability of stipulated results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable." *State v. Grier*, 307 N.C. at 642-3.

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<sup>11</sup> The hearing in *Mendes* took four days of trial court time. 406 Mass. at 202. In that State, even after fifteen years of admitting polygraph evidence, the trial court still had to start from the beginning of the polygraph inquiry, because of the unique and subjective nature of such evidence. See Section I.B, *supra*, of this brief; see also *Brown v. Darcy*, 783 F.2d 1389, 1397 (9th Cir. 1986) (polygraph admissibility hearing took two days of eight day trial).



Wisconsin reinstated a *per se* rule of exclusion after seven years of admitting polygraph evidence on stipulation with strict conditions. *State v. Dean*, 103 Wis. 2d at 279. The Wisconsin Supreme Court concluded that the conditions it had previously placed on admissibility had failed "to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do." *State v. Dean*, 103 Wis. 2d at 279.

After a year of admitting polygraph evidence by stipulation, the Oklahoma Supreme Court reinstated a *per se* rule of exclusion, citing the unreliability of polygraph evidence. *Fulton v. State*, 541 P.2d at 872.

The negative effect on the administration of criminal justice of even a limited rule of admissibility for polygraph evidence is evident in the experience of the foregoing States. In this context, a *per se* rule of exclusion is neither arbitrary nor unjustified, given the at best minimal probative value of polygraph test results. See Section I.B, *supra*.

**D. States Have A Legitimate Concern That Polygraph Evidence Will Impermissibly Infringe On The Province Of The Jury<sup>12</sup> To Determine Credibility**

Testimony about polygraph test results is unique in that it expresses an opinion on the credibility of a witness. Because there is no basis for concluding that such testimony provides a better determination of credibility than the personal observation and assessment of each juror, allowing polygraph evidence in trials is a direct invasion of the province of the jury.

Scientific testimony is admitted to assist jurors in understanding matters that are not within their personal knowledge and that they cannot assess on their own. See Section II, *infra*. By contrast, the testimony of a polygrapher does not add or explain relevant facts that jurors would be unable to infer on their own. Rather, it is an opinion about the veracity of a particular witness. But a determination whether a witness is credible is well within the understanding and ability of the average juror without assistance. A juror is capable of assessing a witness' body language, manner, tone of voice and other physical manifestations during testimony in order to make a determination about veracity. "[F]orming impressions and intuitions regarding witnesses is the quintessential jury function." *State v. Porter*, 241 Conn. at 120. Thus the testimony of a polygrapher is not necessary to assist the jurors in understanding a concept with which they have no experience or ability to understand.

Even more troubling is the fact that the testimony of a polygraph examiner is an opinion on the ultimate issue of

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<sup>12</sup> The analysis employed in this section applies with equal force to the judge as factfinder in a trial to the court.

guilt or innocence. While experts in disciplines such as fingerprint analysis, DNA testing or ballistics testify about and explain the results of such tests, they are not permitted to render a conclusion about a criminal defendant's guilt or innocence. Jurors are free to disregard expert scientific evidence and focus on other factual evidence that proves or disproves the prosecution's case. But jurors must always evaluate credibility and therefore will not be able to ignore or disregard polygraph evidence as easily. If such evidence is routinely admitted, polygraphers may preempt jurors in the area of credibility determinations.

Jurors might be unduly influenced by the opinion of a single "expert" and thus abrogate their collective function to determine credibility. "We afford criminal defendants the right to trial by a panel of several jurors partly out of the recognition that, although one person may be misled when a witness gives the 'incorrect' physical signals, the cumulative impressions of the group are likely to lead to the truth." *State v. Porter*, 241 Conn. at 119.<sup>13</sup> "The mention of polygraphs in the presence of the jury impermissibly suggests that there is a scientific way to find the truth where in reality, the jury decides what is true and what is not." *Robinson v. Commonwealth*, 231 Va. at 155; accord, *State v. Ober*, 493 A.2d at 493 (danger that jury will rely on test results to establish credibility); *State v. Brown*, 297 Or. at 445 (potential for misuse or over-valuation by jury).

<sup>13</sup> Studies about the actual effect of polygraph evidence on jurors are limited in number and inconclusive. See *State v. Porter*, 241 Conn. at 117-118 (reviewing studies). "In view of the importance of maintaining the role of the jury, this uncertainty alone justifies the continued exclusion of polygraph evidence." *Id.* at 118.

## II. THE DAUBERT STANDARD DOES NOT REQUIRE INVALIDATION OF RULES EXCLUDING POLYGRAPH EVIDENCE

In *Scheffer*, the court noted that Rule 707 precluded the defendant from an opportunity to show that polygraph evidence might satisfy the federal test for the admissibility of scientific evidence established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.ed.2d 469 (1993).

In *Daubert*, this Court discarded the "general acceptance" test first adopted in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); as incompatible with Rule 702 of the Federal Rules of Evidence.<sup>14</sup> In its place, this Court formulated a new standard which requires that the focus of a court's assessment of the validity of proffered scientific evidence "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.<sup>15</sup> If the methodology meets some minimum standard of validity and it will "assist the

<sup>14</sup> Rule 702 provides: **TESTIMONY BY EXPERTS.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<sup>15</sup> The proponent of the evidence must demonstrate, however, that an expert's conclusions and testimony are actually derived from that methodology. *Daubert*, 509 U.S. at 591. Moreover, although "general acceptance" is no longer a requirement for admissibility, it is still a factor which courts employing a *Daubert* analysis can and should consider. *State v. Porter*, 241 Conn. at 84-85; *Commonwealth v. Lannigan*, 419 Mass. 15, 26, 641 N.E.2d 1342 (1994); see AMERICAN COLLEGE OF TRIAL LAWYERS REPORT, "STANDARDS AND PROCEDURES FOR DETERMINING THE ADMISSIBILITY OF EXPERT EVIDENCE AFTER DAUBERT," 157 F.R.D. 571, 574 (1995).



trier of fact," the evidence meets the threshold for admissibility. *Id.* at 589.

States that have considered the admissibility of polygraph evidence under a standard analogous to Daubert or Federal Rule of Evidence 702 have held that it should be excluded *per se* because its prejudicial impact outweighs whatever probative value it possesses. See *State v. Porter*, 241 Conn. at 75-76, 93-94 (assuming polygraph evidence meets Daubert's threshold requirement, court retains *per se* rule of exclusion because of prejudicial impact); *In Re Odell*, 672 A.2d at 459 (reaffirming Rhode Island's rule excluding polygraph evidence as "consistent with the opinion of the Supreme Court in *Daubert*"); *Perkins v. State*, 902 S.W.2d at 92-93 (polygraph evidence inadmissible in Texas even after abandonment of *Frye* because it impermissibly decides an issue for the jury); *State v. Beard*, 194 W.Va. at 745-746 (polygraph evidence still inadmissible after Daubert because of its unreliability); *State v. Brown*, 297 Or. at 433 (valid reasons preclude admissibility of polygraph evidence even if it satisfies requirements of Rules 401 and 702).<sup>16</sup>

<sup>16</sup> Because *Daubert* was based on an interpretation of Federal Rule of Evidence 702, it is not binding on the States. Nevertheless, many states have discarded *Frye* in favor of the validity standard embodied in *Daubert*. See *State v. Porter*, 241 Conn. at 76-77 and n.20 (citing cases).

But several states still retain the *Frye* test. See, e.g., *State v. Flanagan*, 625 So.2d 827 (Fla. 1993); *People v. DalCollo*, 669 N.E.2d 378 (Ill.App. 2d Dist.), cert. denied, 675 N.E.2d 635 (Ill. 1996); *Armstead v. State*, 673 A.2d 221 (Md. 1996); *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989); *State v. Dean*, 523 N.W.2d 681 (Neb. 1994); *State v. Vandebogart*, 616 A.2d 483 (N.H. 1992); *Commonwealth v. Crews*, 640 A.2d 395, 400 n.2 (Pa. 1994).

California and New York have expressly rejected *Daubert* in favor of the *Frye* test. See *People v. Leahy*, 8 Cal.4th 587, 595, 882 P.2d 321, 34 Cal. Rptr. 2d 663 (1994); *People v. Wesley*, 83 N.Y.2d (continued...)

As these cases recognize, simply crossing Daubert's threshold does not automatically guarantee admissibility. *Daubert*, 509 U.S. at 595. Scientific evidence is still subject to the limitations and requirements imposed by the rules of evidence. In particular, the evidence must be not only relevant, but reliable and more probative than prejudicial. See Section I, *supra*. The relevant inquiry, then, is not whether polygraph evidence passes the *Daubert* threshold, but, assuming it possesses some degree of probative value, whether there are nevertheless valid reasons for excluding it on grounds that it is unduly prejudicial. As the cases demonstrate, the States have continued to limit the admissibility of polygraph evidence because the significant policy concerns discussed in Section I of this brief have not been resolved.

Some federal courts have discarded their *per se* rules against the admissibility of polygraph evidence in light of *Daubert*. See e.g., *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); *United States v. Piccinonna*, 885 F.2d 1520 (11th Cir. 1989); *United States v. Crumby*, 895 F.Supp. 1354 (D. Ariz. 1995). These courts focus on Daubert's threshold requirement for admitting scientific evidence, but give too little consideration to the important policies and concerns about unreliability and prejudice that nevertheless justify excluding it. They perform an incomplete analysis by failing to determine whether the evidence, even if probative,

<sup>16</sup>(...continued)

417, 423, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

Some states have fashioned their own tests for the admissibility of scientific evidence. See, e.g., *State v. Montalbo*, 828 P.2d 1274, 1279 (Haw. 1992); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *State v. Jones*, 259 S.E.2d 120 (S.C. 1979); *State v. Morgan*, 485 S.E.2d 112 (S.C. Ct. App. 1997).



satisfies other applicable rules of evidence.<sup>17</sup> *Daubert* does not require the result reached by these courts and by the *Scheffer* court.

There is no requirement that state and federal courts have uniform standards for the admissibility of evidence. This Court "should be cautious about constitutionalizing every procedural device found useful in federal courts," thereby precluding the individual States from formulating legitimate rules based on tradition and experience. *Crist v. Bretz*, 437 U.S. 29, 98 S.Ct. 2156, 2163, 57 L.Ed.2d 24 (1978) (Burger, C.J., dissenting). This Court "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. at 201. The States, which have considered and reconsidered the admissibility of polygraph evidence over the seventy-plus years since *Frye* was decided, have continued to reject it. This Court should not disregard the collective wisdom and experience of the States in order to affirm *Scheffer*.

<sup>17</sup> In *Piccinonna*, the Court of Appeals modified its *per se* rule excluding polygraph evidence and remanded for the district court's consideration of admissibility. The district court again excluded the polygraph evidence, on the ground that it failed to satisfy Federal Rule of Evidence 608(a). *United States v. Piccinonna*, 729 F.Supp. 1336 (S.D. Fla. 1990), *aff'd* 925 F.2d 1474 (11th Cir. 1991); cf. *United States v. Black*, 831 F.Supp. 120, 122-123 (E.D.N.Y. 1993) (upholding exclusion without a hearing where polygraph evidence satisfying Rules 401 and 702 held not sufficiently reliable for admissibility under *Daubert*).

## CONCLUSION

For all of the foregoing reasons, the amici States respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Armed Services and hold that a *per se* rule barring admission of polygraph evidence is not unconstitutional.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

EDWARD G. SCHEFFER,

*Respondent.*

**On Writ of Certiorari to the  
United States Court of Appeals for the Armed Forces**

**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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37 pp

## **QUESTION PRESENTED**

Does Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, create an unconstitutional abridgement of military defendants' right to present a defense?



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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF THE PETITIONER**

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**INTEREST OF AMICUS CURIAE**

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case presents a dangerous expansion of the right to present evidence. It will undercut the ability of rulemaking bodies to fashion *per se* exclusions of certain types of inherently unreliable or prejudicial evidence. It will also expand the use of polygraph evidence, a class of evidence that is inherently danger-

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1. Both parties have consented to the filing of this brief. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

ous to justice. This is contrary to the interests CJLF was formed to protect.

### SUMMARY OF FACTS AND CASE

Defendant, an airman in the Air Force, was working as an informant for the Air Force Office of Special Investigations (OSI), where he assisted the OSI in identifying drug dealers. On April 7, 1992, at the request of OSI, defendant submitted a urine sample, a normal procedure for controlled informants. *United States v. Scheffer*, 44 M. J. 442, 443 (1996). On April 10, defendant was asked to submit to a polygraph examination. He was asked whether he used drugs while in the Air Force, whether he had lied in any of the drug information given to OSI, and whether he told anyone other than his parents that he was helping OSI. Defendant answered "no" to each, and the polygrapher judged that he was telling the truth. *Ibid.*

Defendant's urinalysis tested positive for methamphetamine. *Ibid.* At the court-martial, defendant asked the military judge to admit the results of his polygraph. The court declined. *Ibid.* At trial defendant testified that he did not knowingly ingest drugs, implying that someone drugged him without his knowledge. See *id.*, at 443-444. Defendant was cross-examined on inconsistencies between his testimony and earlier statements to OSI. *Id.*, at 444. Defendant's credibility was also attacked at closing argument. *Ibid.* Defendant was convicted of "uttering bad checks, wrongfully using methamphetamine, failing to go to his appointed place of duty, and absenting himself for 13 days without authority . . . ." *Id.*, at 443.

The United States Court of Appeals for the Armed Forces reversed the conviction. It held that Military Rule of Evidence 707's *per se* exclusion of polygraph evidence violated defendant's right to present a defense. *Id.*, at 445.

### SUMMARY OF ARGUMENT

The polygraph is a scientifically invalid machine that does not deserve the constitutional protection given by the court below. The problems with polygraphy are old and continuous;

polygraphers and polygraphs have a long history of promising much more than they deliver. There is no reason to believe that recent innovations change the validity of the polygraph as a lie detector, as the last substantial changes in polygraph techniques are over 30 years old.

The polygraph is not a valid lie detector. Its greatest problem is that there is no valid theoretical explanation for the polygraph as a lie detector. Because there is no specific physiological response for lying, polygraphy must rely on an indirect method measuring changes in relative stress levels to determine whether the suspect is lying. The problem with this measure is that many other emotional states such as fear or anger can cause such changes. Because the polygraph cannot discriminate between these emotional states and deception, any attempt by a polygrapher to classify a subject as truthful or deceptive is little more than a guess.

The polygraph also lacks empirical validation. The only studies that could justify the polygraph are those done in the field. Since laboratory experiments cannot reproduce the consequences of failing the exam to the subject, the necessary fear of being caught is lacking in lab studies. Field studies, the alternative to laboratory work, have their own problems. One difficulty is finding an appropriate measure outside the polygraph to determine whether the suspect is lying. One method, relying on an outside panel of judges to review the case, has the obvious problem of subjectivity and human fallibility. The other method, using confessions as a validation measure, creates a bias that exaggerates the polygraph's purported reliability.

The few appropriate studies do not support the case for the polygraph. The scientific community has concluded from the various studies that while the accuracy level of the polygraph may be somewhat better than chance, the polygraph has a substantial problem with unjustly accusing the innocent. This false positive rate has long been the Achilles' heel of the polygraph. The rate of failure to detect the guilty, the false negative rate, is almost certainly understated because those who fool the polygraph in the field will not be further investigated. The best explanation for whatever accuracy the polygraph possesses is that it is a great device for generating confessions.



Although it purports to be neutral on the admissibility of polygraphs, the decision below would create a constitutional right to exculpatory polygraphs. This would be a disaster for justice. If polygraph use becomes widespread, it will be a trap for the innocent and a potential windfall for the guilty. The best study shows that the polygraph is no better than chance at finding the innocent. Since an adverse polygraph will have to be admitted against a defendant in order to validate the initial examination, polygraphs will likely wind up convicting innocent defendants. Since the polygraph can be beaten through techniques that are relatively easy to learn and employ, the widespread use of exculpatory polygraphs creates a potential windfall for guilty defendants who have little to lose by taking a polygraph examination that they can learn to beat.

The decision below improperly extends this Court's right to present evidence jurisprudence. *Chambers v. Mississippi*, 410 U. S. 284 (1973) was very fact-specific and involved the denial of highly exculpatory evidence. *Rock v. Arkansas*, 483 U. S. 44 (1987) dealt with the arbitrary denial of a defendant's right to testify on her own behalf. The polygraph is invalid, threatens the innocent, will be overvalued by juries, and invades the jury's province as the primary finder of credibility. These important policy concerns all readily distinguish Military Rule of Evidence 707 from the arbitrary limitations of highly exculpatory evidence overturned in *Chambers* and *Rock*.

The decision below is not limited to striking down exclusions of polygraph evidence. It threatens any categorical exclusion of evidence, such as privileges, competency rules, and rape shield laws. This is an unwarranted abrogation of state and federal rulemakers' ability to create rules of evidence. Such a breathtaking extension of judicial authority cannot be allowed to stand.

## ARGUMENT

### I. The validity of polygraph testing is at best dubious and is unlikely to ever improve.

In its decision below, the Court of Appeals for the Armed Forces claimed that it was not endorsing the use of polygraphs. See *United States v. Scheffer*, 44 M. J. 442, 446 (1996). Instead, it saw its decision as serving "the truth-seeking function . . . by keeping the door open to scientific advances." *Ibid.* So long as Military Rule of Evidence 707 was valid, the court could not "determine 'whether polygraph technique can be said to have made sufficient technological advance in the 70 years since *Frye* to constitute the type of 'scientific, technical, or other specialized knowledge' envisioned by Rule 702 and *Daubert*.'" *Ibid.* (quoting *United States v. Posado*, 57 F. 3d 428, 433 (CA5 1995)).

This ignores the enormous problems posed by polygraph evidence. The idea of "lie detectors" is as old as the law. Equally old is the fact that these detectors have always promised much more than they can deliver. The polygraph is no different. It has a long history of falling short of the claims of its inventors. No recent events have changed this situation. As this section will demonstrate, the polygraph is a test with no sound theoretical basis; its validity is unproven and is likely to be unprovable. Striking down an act of the Commander-in-Chief,<sup>2</sup> if it is to be done at all on an evidentiary rule, should be based on evidence much stronger than this.

#### A. A Brief History.

Most disciplines that attain recognition as valid scientific evidence do so relatively quickly. DNA "fingerprinting" was first introduced in American courts in 1988. See Lander & Budowle, DNA Fingerprinting Dispute Laid to Rest, 371 Nature 735 (Oct. 27, 1994). While its initial acceptance was accompanied with

2. Under Article 36 of the Uniform Code of Military Justice, the President, as Commander-in-Chief, may establish rules of evidence for courts-martial. See 10 U. S. C. § 836(a). This delegation of power is constitutional. See *Loving v. United States*, 517 U. S. \_\_\_, 135 L. Ed. 2d 36, 56-57, 116 S. Ct. 1737, 1749 (1996).



controversies over techniques and its application, see *ibid.*, by 1994 "the DNA fingerprinting controversy had been resolved." *Id.*, at 738.

The field of lie detection has a much longer and much more checkered past. Efforts to ferret out liars through means other than human judgment are as old as the law. Water ordeals are found in Hammurabi's Code and the ancient Hindu Laws of Manu. See Underwood, Truth Verifiers: From the Hot Iron to the Lie Detector, 84 Ky. L. J. 597, 602 (1996). The ordeal, whether by water, hot iron, or other means, continued, even during the development of the common law. See 4 W. Blackstone, Commentaries 338 (1st ed. 1769).

The polygraph is the modern version of the ordeal. The first polygraph was invented by William Martson, a psychologist with a law degree. See D. Lykken, A Tremor in the Blood 27 (1981). Martson's device measured the subject's systolic blood pressure. See Underwood, 84 Ky. L. J., at 629. In spite of relentless self-promotion, see Lykken, *supra*, at 27, this machine was rejected in the landmark case of *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923), superseded by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993). See 84 Ky. L. J., at 629.<sup>3</sup>

Marston's work was taken up by John Larson, a police officer turned forensic psychologist. *Ibid.* He developed the forerunner of the modern polygraph, which measured and graphed pulse, blood pressure, and respiration. Once again, however, this machine came up short. "Larson's honest scientific bent compelled him to subject his own theories to rigorous testing, and he wound up (bitterly?) rejecting polygraphy as a 'racket' and a 'psychological third degree.'" *Ibid.*

A student of Larson's, Leonarde Keeler, developed the modern form of the polygraph by adding a measurement of galvanic skin resistance. See *id.*, at 630. This work occurred in the 1920's and 1930's. See Lykken, *supra*, at 30. The last major

3. Marston's work was better received in his other career, as Charles Moulton, the creator of the comic character "Wonder Woman," who had a magic lasso that made people tell the truth. See Lykken, Reply to Raskin & Kircher, 27 Jurimetrics J. 278, 282 (1987).

breakthrough in polygraph testing started just after World War II, when in 1947 John Reid started to develop the control question technique, see *id.*, at 31-32, which with some refinements is now the majority approach among American polygraphers. *Id.*, at 32-33. Those refinements involve scoring, where many polygraphers now employ a more systematic "zone of comparison" format, which develops a numerical score to determine whether the suspect is lying. See *id.*, at 34.<sup>4</sup> There is also developmental work now being done in computerized scoring and in finding less intrusive sensors. See Yankee, The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception, 40 J. Forensic Sciences 63 (1995). This work, however, is still considered experimental, even by its advocates. See *id.*, at 66.

The notion that tremendous recent advances in polygraphy justify its acceptance as scientific evidence is seriously misplaced. While polygraphs may now be less dangerous to justice than the one rejected in *Frye*, the basics of the polygraph have remained relatively unchanged for over 30 years.

What has changed is the willingness of a handful of courts to accept the polygraph, and the size of the polygraph's lobby. See Furedy, The North American CQT Polygraph and the Legal Profession: A Case of Canadian Credulity and a Cause for Cultural Concern, 31 Crim. L. Q. 431 (1989) (reporting annual rate of over two million tests in the U. S.). Whatever impact these claims might have in a jurisdiction without a specific rule on point, it takes more than this to invoke the Due Process Clause or the Sixth Amendment to strike down the judgment of the rule-making authority.

#### B. The Polygraph in Action.

The polygraph is simply a machine that records and graphs up to four different physical responses: (1) galvanic skin response; (2) the "cardio" response, roughly the mean of the systolic and diastolic blood pressures; (3) respiration; and, if used, (4)

4. The other scoring method is called "global scoring," where the polygrapher places more reliance on factors outside the polygraph such as the subject's behavioral symptoms. See *id.*, at 32-33.

"changes in the peripheral vasculature, as represented by blood flow in the tip of the index finger." Furedy & Heselgrave, *Validity of the Lie Detector, A Psychological Perspective*, 15 *Crim. Just. & Behav.* 219, 225-226 (1988). These responses are simultaneously and continuously recorded on a chart. Giannelli, *Forensic Science: Polygraph Evidence: Part I*, 30 *Crim. L. Bull.* 262, 264 (1994). The machine, however, does not detect deception. "It is the examiner who, based on these readings, infers deception." *Ibid.*

The examiner is the single most important component of the polygraph test.

"Even the proponents of the polygraph technique agree that the examiner, and not the machine, is the crucial factor in arriving at reliable results. The examiner's expertise is critical in (1) determining the suitability of the subject for testing; (2) formulating proper test questions; (3) establishing the necessary rapport with the subject; (4) detecting attempts to mask or create chart reactions, or other countermeasures; (5) stimulating the subject to react; and (6) interpreting the charts." *Ibid.* (footnote omitted).

Before the examination, the examiner conducts a pretest interview with the subject. This serves to acquaint the subject with the polygraph in order to convince him of the polygraph's effectiveness. The examiner will also use the interview to determine whether the subject is suitable for examination and to formulate test questions with the subject's help. See *id.*, at 265. After this, the questioning begins.

There are three basic questioning techniques. The oldest is the relevant/irrelevant (R/I) test, where the relevant questions are incriminating and the subject's responses to the questions are compared to the responses to neutral, irrelevant questions. If the polygraphic reactions to the relevant questions are strong relative to the irrelevant questions, then the subject is considered deceptive. D. Lykken, *a Tremor in the Blood* 105 (1981). This procedure has been roundly criticized as relying on the "wildly implausible" assumption that a truthful subject will not be aroused by relevant questions. *Id.*, at 106; see also Giannelli, 30 *Crim. L. Bull.*, at 265-266; Furedy & Heselgrave, 15 *Crim. Just. & Behav.*, at 227.

Although still used by some polygraphers, the R/I test has largely been replaced by the Control Question Test (CQT).<sup>5</sup> See 15 *Crim. Just. & Behav.*, at 227. This method adds a third type of question, a control question, to the relevant and irrelevant questions. See Giannelli, 30 *Crim. L. Bull.*, at 266. The control questions are

"designed to elicit at least as much emotion as the relevant questions do for the innocent. For example, the polygrapher may establish during the first phase that the interviewee has stolen something on a previous occasion. Then the polygrapher asks the interviewee to answer 'no' (i.e., lie) to the following control question: 'Apart from the present problem, did you ever steal anything in your life?' The deception on this question by an innocent subject is presumed to produce a larger response than the (truthful) answer by him or her to the relevant question." Furedy & Heselgrave, 15 *Crim. Just. & Behav.*, at 227.

This method has its own problems. It is extremely difficult to design a proper control question in a criminal investigation because any suspect, even an innocent one, is likely to have a high level of fear regarding the consequences of answering the relevant question. See Alpher & Blanton, *The Accuracy of Lie Detection: Why Lie Tests Based on the Polygraph Should Not Be Admitted Into Evidence Today*, 9 *Law & Psychol. Rev.* 67, 72 (1985). Its substantial theoretical problems are further explained in part I C 1, *post*. Because it is by far the most common exam, the CQT will be the focus of the rest of the polygraph analysis in this brief.<sup>6</sup>

The examination consists of ten to twelve questions. The first one or two are irrelevant, then followed by interspersed control, relevant, and irrelevant questions. While the suspect knows what questions will be asked, he does not know in what order the

5. The CQT is sometimes called the Control Question Technique. See *ibid.*

6. One other form of questioning is called the Guilty Knowledge Test. This test looks to the polygraphic response to questions concerning knowledge possessed only by the police and the perpetrator. The concealed knowledge requirement greatly limits its use. See Giannelli, 30 *Crim. L. Bull.*, at 266. Obviously, an examiner retained by an innocent defendant would not have the requisite information.



examiner will ask them. Giannelli, 30 Crim. L. Bull., at 267. The examination lasts several minutes and is repeated at least once; it is often repeated two or three times. *Ibid.*

The polygrapher then determines whether the subject is truthful by scoring the examination. There are three methods of scoring: global, numerical, and computerized. *Id.*, at 268. Global evaluation is the oldest method, involving "an overall impression of the charts plus other factors," such as the subject's demeanor. *Ibid.* This is strongly criticized by some as injecting too much subjectivity and speculation into the test. See *ibid.*

Under the numerical method, only the recorded chart reactions are considered. There are several different systems for analyzing the charts. They typically compare the reactions to each pair of relevant and control questions and then score the comparison. The scores range from +3 for a large reaction to a control question to a -3 for a similar reaction to the relevant question. A total score of +6 or more indicates truth while -6 or less is deceptive. *Ibid.* By giving a numerical value to truth, this method is believed to be more objective. *Ibid.* Any other result is labeled inconclusive. However others criticize this method because the scoring is at least partially subjective and the +6 cut off is arbitrary. Furedy & Heselgrave, *supra*, 15 Crim. Just. & Behav., at 230. Computer scoring is still experimental, see *ante*, at 7, and is really a specific application of the numerical approach. Giannelli, 30 Crim. L. Bull., at 268.

### C. The Invalid Test.

The polygraph test starts off on the wrong foot in the race for respectability. Because it attempts to measure a mental characteristic, the state of lying or truth telling, the polygraph is a psychological test. See Kleinmuntz & Szucko, On the Fallibility of Lie Detection, 17 Law & Soc. Rev. 85, 86 (1982). As an aspiring social science, polygraphy is softer and more uncertain than other, "harder" disciplines. See Note, Social Statistics in the Courtroom: The Debate Resurfaces in *McCleskey v. Kemp*, 62 Notre Dame L. Rev. 688, 696 (1987). Therefore, its validity is more difficult to prove than tests grounded in the physical sciences. Thus, any claims of infallibility for polygraphs should be viewed with great caution. Absolute proof of the polygraph's validity may be

unattainable. As *amicus* will demonstrate, the case for the polygraph's invalidity is both easier to make and much stronger.

### 1. Theoretical problems.

Scientific evidence does not appear out of thin air. Integral to any scientific test or other process that produces evidence is the theoretical basis of the scientific procedure in question. "Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 590 (1993) (quoting Brief for American Association for the Advancement of Science et al. as *Amici Curiae* (emphasis in original)). Thus, science is defined as "[t]he observation, identification, description, experimental investigation, and theoretical explanation of phenomena." American Heritage Dictionary 1616, cl. 2 (3d ed. 1992) (emphasis added). By explaining the relationship between events or phenomena, theory is the glue that holds together a body of knowledge, making it a science.

The polygraph lacks an appropriate theoretical explanation as a lie detector. The most straightforward theoretical explanation of the polygraph's purported truth telling abilities would be that there is a specific physiological response to lying, which the polygraph measures. "The problem with lie detection *per se* is that the attribute of interest, lying or truthfulness, cannot be directly measured." Alpher & Blanton, The Accuracy of Lie Detection: Why Lie Tests Based on the Polygraph Should Not Be Admitted into Evidence Today, 9 Law & Psychol. Rev. 67, 68, n. 7 (1985) (emphasis in original). The marks on the polygraph simply do not directly measure lying. "Autonomic arousal may be caused by deception, but it may also be caused by myriad potentially confounding factors, ranging from stress, fear and anxiety, to anger and embarrassment. Deception itself cannot be measured directly." Steinbrook, The Polygraph Test—A Flawed Diagnostic Method, 327 New Eng. J. Med. 122, 122 (1992) (emphasis added). Because "there is no set of responses—physiological or otherwise—that humans emit only when lying or that they produce only when telling the truth," Kleinmuntz & Szucko, 17 Law &



Soc. Rev., at 87, polygraphy, as currently practiced through the CQT lacks "a sound theoretical basis . . ." Patrick & Iacono, Validity of the Control Question Polygraph Test: The Problem of Sampling Bias, 76 J. Applied Psychol. 229 (1991).

The consequence of this absence of a foundation for the validity of the polygraph as a lie detector is devastating. As an article in Britain's leading medical journal concludes:

"There is no rational scientific basis for any machine to detect liars consistently, since there is no known consistent physiological response unique to the cognitive state of lying. Public policy makers should therefore ponder the very weak scientific foundation upon which the polygraph rests as they make decisions affecting its use in society." Brett, Phillips, & Beary, Predictive Power of the Polygraph: Can the "Lie Detector" Really Detect Liars, Lancet [1986] i:544, 546-547 (footnote omitted).

Military Rule of Evidence 707 simply reflects the Commander-in-Chief's understanding of the polygraph's substantial limitations.

The theoretical weakness of polygraphs, and the fact that this situation continues over 75 years since polygraphy was rejected in *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923), is most likely explained by its unscientific development. The "evolutionary development of traditional polygraph procedures has been backwards: Field development has preceded systematic laboratory evaluation of the procedures. This may reflect that the traditional procedures were developed by lawyers and law enforcement officials, not by scientists." Bashore & Rapp, Are There Alternatives to Traditional Polygraph Procedures? 113 Psychol. Bull. 3, 15 (1993). As "[n]one of the major figures in the development of instrumental interrogation methods have had credentials as scientists," D. Lykken, A Tremor in the Blood 42 (1981), it is understandable that polygraphy lacks the most basic of scientific credentials. This also helps to explain why the polygraph does not conform to the standards for psychological testing of the American Psychological Association. Steinbrook, 327 New Eng. J. Med., at 122-123.

The problem with the polygraph is that many very different emotional responses can cause very similar reactions on the polygraph.

"No doubt when we tell a lie many of us experience an inner turmoil, but we experience a similar turmoil when we are falsely accused of a crime, when we are anxious about having to defend ourselves against accusations, when we are questioned about sensitive topics—and, for that matter, when we are elated or otherwise emotionally stirred." Kleinmuntz & Szucko, 17 Law & Soc. Rev., at 87; see also Steinbrook, 327 New Eng. J. Med., at 122 ("Autonomic arousal may be caused by . . . stress, fear and anxiety to anger and embarrassment").

The theoretical critique has important practical effects. Perhaps the greatest danger posed by the polygraph is its strong tendency to misidentify the truthful as deceptive. See *post*, at 17. The fact that many different emotions may cause similar reactions on the polygraph helps explain this problem. An innocent person could be angry when asked the accusatory control question. Because "the polygraph pens do no special dance when we are lying," see 17 Law & Soc. Rev., at 88, this anger is likely to be interpreted as deception, particularly if the less subjective numerical scoring method is used.

The theoretical problems of polygraph testing are found even in its terminology. The Control Question Test is a misnomer.

"[T]he term *control* here is not used in the scientific sense. In the scientific sense of the term, assuming the phenomenon to be investigated is deception, the control question should be identical in every respect to the relevant question except for the presence of deception in the latter question; in terms of the logic of scientific experimentation, the relevant question is like the experimental condition." Furedy & Heselgrave, A Psychological Perspective, Validity of the Lie Detector, 15 Crim. Just. & Behav. 219, 227 (1988) (emphasis in original).

True "control" in the scientific sense is missing "because it is impossible to estimate what the relevant response would have been if the answer to the relevant question had been honest." *Id.*, at 234. In reality, control questioning, like the polygraph, is no more than guesswork.

It is possible for the polygraph to lack theoretical explanation yet still be considered scientific. "[C]arefully controlled empirical research" could establish the validity of polygraphs. See Patrick

& Iacono, 76 J. Applied Psychol., at 229. As the next section demonstrates, such evidence is sorely lacking.

## 2. *The empirical record.*

Any effort to establish an adequate empirical record of the polygraph's validity as a lie detector faces formidable obstacles. As with the vast majority of social science studies, it is extremely difficult to set up proper experimental conditions for assessing the polygraph's validity. There are two experimental methods for assessing polygraph validity, laboratory and field experiments. In laboratory experiments the researchers measure the ability of polygraphers to determine whether volunteers are telling the truth concerning some predetermined story or set of events. Although easily controlled, lab experiments have substantial limitations.

"There are important differences between the laboratory and forensic environments that may undermine the validity of these experiments. The principal difference is that fear of detection is not as strong for experimental subjects. In addition, some of the laboratory studies fail to replicate field conditions; they use neither experienced examiners nor general population samples as subjects." Giannelli, *Forensic Science: Polygraph Evidence: Part I*, 30 Crim. L. Bull. 262, 270-271 (1994) (footnotes omitted).

Given the considerable importance fear of detection has in the polygraph's credibility, see *ante*, at 19, it stretches credulity to believe that the result of a polygraph is close to being as important to a volunteer for an experiment as it is to a person threatened with losing one's job or liberty. The fact that some researchers try to address this problem by using "substantial cash bonuses," see *id.*, at 270, n. 58, does not make the laboratory polygraph life-like.

"Since the emotional impact of such artificial simulations, as well as the importance to the individual of the outcome, is inevitably very different than in real life situations, such laboratory assessments provide no valid basis for estimating the accuracy of the lie test in the field." Lykken, *The Lie Detector and the Law*, 8 Crim. Defense 19, 23 (1981).

The other method of assessing validity, "field studies of actual cases," Giannelli, 30 Crim. L. Bull., at 270, has its own problems.

The greatest problem with determining whether the polygraph has been accurate in the field is finding "a valid criterion for establishing guilt or innocence" apart from the result of the polygraph. See *ibid.* "Some studies use panels of trial attorneys to determine guilt, an approach with obvious problems." *Ibid.* As another researcher noted, "[i]t cannot be assured that all judicial [panel] decisions were correct, because there is no way of independently estimating the 'ground truth.'" Furedy & Heselgrave, *Validity of the Lie Detector, A Psychological Perspective*, 15 Crim. Just. & Behav. 219, 238 (1988).

Most other field studies use subsequent confessions to determine actual guilt and thus polygraph validity. See Giannelli, *supra*, 30 Crim. L. Bull., at 270; see also Patrick & Iacono, *supra*, 76 J. of Applied Psychol., at 229. Once again, this method comes with significant problems. "Although confessions are perhaps the most certain criterion for ground truth available, and also the most frequently used in field research, an exclusive reliance on confession-verified cases may produce a specific sampling bias that results in inflated accuracy figures." 76 J. of Applied Psychol., at 229. The bias is created because the polygrapher is too closely associated with the confessions which are used to assess their accuracy.

If there is one thing that a polygraph test does well, it is getting people to confess. The inherently stressful nature of the polygraph, when combined with an experienced questioner used to dealing with "deceptive" results, is a difficult combination for many suspects to withstand. Thus, many consider the polygraph a "painless third degree." See Goldzband, *The Polygraph and Psychiatrists*, 35 J. Forensic Sciences 391, 397 (1990); see also D. Lykken, *A Tremor in the Blood* 211-212 (1981) (polygraph as a "fourth degree" that induces confession). Indeed, its ability to generate confessions is the most likely reason for the continued use of the polygraph by law enforcement and security personnel. See 35 J. of Forensic Sciences, at 398-399.

It thus comes as no surprise that in field studies "confessions are most often obtained by polygraphers after a subject has failed the polygraph test." Patrick & Iacono, 76 J. of Applied Psychol., at 229. This fact, when combined with human nature, explains why so many field studies are strongly biased towards the polygraph's validity.



"A deceptive polygraph test outcome provides the incentive for an examiner to interrogate a subject, and if the subject confesses, the polygraph outcome is confirmed. (In the ultimate version of this self-fulfilling prophecy, an examiner may accept a minor admission from the subject—one that does not relate specifically to the issue of the polygraph test—as evidence of the subject's guilt.) One the other hand, guilty subjects who produce truthful outcomes are not interrogated, and therefore there will be no opportunity for false negative errors to appear in a confession-verified sample. False positive errors will lack representation for similar reasons: If an innocent person produces a deceptive polygraph test outcome, he or she will be presumed guilty (even though a confession is not obtained), and further investigative effort will seldom be expended to identify the real culprit. As a result of these selection biases, virtually all of the cases included in a confession-verified test sample will be (a) those in which the examiner's opinion was deceptive and the subject confessed during post-test interrogation and (b) those in which a truthful opinion was subsequently confirmed by another suspect who confessed following a failed polygraph test." *Ibid.*

This problem is abetted by the practice of subjective scoring used by many examiners to minimize errors. See *id.*, at 229-230. This can lead to a conclusive chart reading being relabeled as an inconclusive result because the chart is contrary to other evidence. As inconclusive charts are excluded from studies, the polygraph appears to be more valid than it really is. See *id.*, at 230.

Given these many complications, it is no surprise that much research on polygraph validity is muddled. The studies on polygraph accuracy give a range of accuracy percentages from over 90% from some polygraph proponents to 64% to 71% (against a chance rate of 50%) from more critical observers. See Furedy & Heselgrave, *supra*, 15 *Crim. Just. & Behav.*, at 236; see also *id.*, at 238-242 (summarizing studies); Giannelli, *supra*, 30 *Crim. L. Bull.*, at 271-274 (excerpting reports); U. S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Review and Evaluation* 97 (1983) (noting "wide variability of results"); American Medical Assn. Council on Scientific Affairs, *Polygraph*, 256 *JAMA* 1172, 1173 (1986).

While the professional polygraphers attempt to draw the brightest conclusions from this muddle, they are hardly disinterested observers. See *People v. Kelly*, 17 Cal. 3d 24, 38, 549 P. 2d 1240, 1249 (1976) (proponents of scientific evidence cannot rely solely on one expert whose career is based on the evidence). Although a handful of the scientific community may stand by the polygraph, most real scientists that have examined polygraphs are critical of its validity. See Furedy, *The North American CQT Polygraph and the Legal Profession: A Case of Canadian Credulity and a Cause for Cultural Concern*, 31 *Crim. L. Q.* 431, 441-442 (1989). The judgment of the bulk of the scientific community is that while the polygraph may be somewhat better than random at finding deception, it has significant problems with its rate of false positive tests. See, e.g., Steinbrook, *The Polygraph Test—A Flawed Diagnostic Method*, 327 *New Eng. J. Med.* 122, 123 (1992); Brett, Phillips, & Beary, *Predictive Power of the Polygraph: Can the "Lie Detector" Really Detect Liars*, *Lancet*, [1986] i:544, 546-547; Council on Scientific Affairs, 256 *JAMA*, at 1175; Office of Technology Assessment, at 97; Furedy & Heselgrave, 15 *Crim. Just. & Behav.*, at 243.

This is the polygraph's Achilles' heel. A "false positive" reading occurs when a truthful suspect "fails" the polygraph test, being improperly labeled a liar because of the positive score on the polygraph. See Furedy & Heselgrave, 15 *Crim. Just. & Behav.*, at 222. Reports on polygraph accuracy consistently note problems with the false positive rate. See, e.g., Giannelli, 30 *Crim. L. Bull.*, at 271; Lykken, *Polygraphic Interrogation*, 307 *Nature* 681, 684 (1984); Furedy & Heselgrave, *supra*, 15 *Crim. Just. & Behav.*, at 222; Steinbrook, 327 *New Eng. J. Med.*, at 123; Patrick and Iacono, 76 *J. of Applied Psychol.*, at 237; Brett, Phillips, & Beary, *supra*, *Lancet*, at 546; Bashore & Rapp, *Are There Alternatives to Traditional Polygraph Procedures?* 113 *Psychol. Bull.* 3, 6 (1993).

One of the most recent and thorough studies of polygraph accuracy found that "when solid criterion evidence is acquired for all possible cases and classifications are based on blind numerical scoring of the polygraph charts, *chance level accuracy figures are observed for innocent subjects.*" Patrick & Iacono, 76 *J. of Applied Psychol.*, at 237 (emphasis added). As acceptance of exculpatory polygraph evidence will force courts to accept



inculpatory polygraphs, see part II, *post*, the decision below will become a trap for at least some innocent defendants.

The polygraph is a machine that has consistently promised more than it delivered. It has no sound theoretical basis. The assumptions underlying its alleged validity are unproven. The empirical case for the polygraph is at best weak and muddled, and may be incapable of being proven. Whatever accuracy the polygraph has displayed in field tests is the likely result of its efficiency as a confession-generating machine. Since many of the people being interrogated in the criminal investigations used for field testing are, in fact, guilty, the polygraph will seem to be accurate by getting these people to confess. But this does no good for the innocent unfairly tapped by the polygraph, and the machine's inaccuracy does not even make a good tool for exonerating those innocents it happens to identify at random.<sup>7</sup>

"The polygraph appeals to an often simplistic desire for certainty in the face of complexity and to misplaced faith in the power of a machine." Steinbrook, 327 New Eng. J. Med., at 123. The President understands this and has thus placed the polygraph outside the military courts.<sup>8</sup> This eminently sensible, scientifically sound decision should not be overturned by any court.

7. For the hidden problem of false negatives and polygraphs and how it will further undercut the polygraph's utility to the criminal justice system, see *post*, at 20-22.

8. There is no contradiction between the President's decision to remove polygraphs from the courts and the continued use of the polygraph as an investigative tool by the federal government. Thus, while the Department of Defense does not recognize the scientific validity of the polygraph, it nonetheless employs the machine because it is "useful" as an investigative tool. See Goldzband, *The Polygraph and Psychiatrists*, 35 J. Forensic Sciences 391, 398 (1990). As the then-Deputy Director of Counter intelligence said, "It's used because at times it causes people to talk, and valuable investigative information is gained. You would be amazed at what some people will talk about!" *Ibid.*

## II. The decision below, if upheld, carries a substantial risk of convicting the innocent and letting the guilty go free.

The decision below claims to be neutral on the question of whether polygraph evidence should be admissible to exonerate criminal defendants. See *United States v. Scheffer*, 44 M. J. 442, 446 (1996). Its sympathies, however, may have been betrayed by its favorable citation of cases supporting the polygraph's use, see *ibid.* (citing *United States v. Piccinonna*, 885 F. 2d 1529, 1532 (CA11 1989); *United States v. Galbreth*, 908 F. Supp. 877 (D NM 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D Ariz. 1995), and its comparing polygraphs to much more valid DNA and hair analysis evidence. See *ibid.* Furthermore, it asserts that most federal courts allow at least limited admissibility of polygraph evidence. See 44 M. J., at 444-445. Although it says it still leaves the admissibility decision to the trial court, *amicus* submits that the writing is on the wall, and this and every other trial court will read the writing and admit polygraph evidence as a matter of constitutional law.

This is a potential disaster for criminal justice in this country. Polygraph evidence cannot be limited to exculpatory uses. In order for a polygraph to have any chance of validity, the suspect must genuinely fear being caught lying—there must be some threat of sufficiently adverse consequences if the suspect is caught in a lie. See American Medical Assn. Council on Scientific Affairs, *Polygraph*, 256 JAMA 1172, 1174 (1986); Giannelli, *Forensic Science: Polygraph Evidence: Part I*, 30 Crim. L. Bull. 262, 270-271 (1994). Therefore, a one-way rule that a polygraph test is admissible for the defendant but not against him would undercut whatever validity the evidence might otherwise have.

For the overwhelming majority of criminal defendants, the consequences of a failed polygraph test will be having the test results admitted against them. Some defendants who are federal employees, like the defendant in the present case, may be able to argue that the threat of a lost job if the polygraph is failed is enough to validate the polygraph. But as exculpatory polygraphs become admissible nationwide, most criminal defendants will not have taken a polygraph under orders of their employers. Instead, a defendant will have to submit to the polygraph on the condition that an adverse result can be used against him as an admission of guilt.

This is one of the most disturbing consequences of the decision below. Because the polygraph so often misidentifies the innocent as guilty, see *ante*, at 17, many innocent suspects will wind up being incriminated by a failed polygraph. See Patrick & Iacono, Validity of the Control Question Polygraph Test: The Problem of Sampling Bias, 76 J. Applied Psychol. 229, 237 (1991) (noting that for polygraphs "chance-level accuracy figures are observed for innocent subjects"). As an inculpatory polygraph is likely to be given great weight by the jury, see *post*, at 25, innocent people will be convicted or plead guilty as a result of failing polygraph tests.

*Amicus* does not pretend to know if more innocents will be exculpated or inculpated by polygraphs. But this Court knows that our system is designed to find and free the innocent. Admitting polygraph evidence short circuits this fundamental component of our system and replaces it with smoke and mirrors.

- Admitting polygraphs creates further injustice. The proportion of people successfully beating the polygraph by generating false negative results is almost certainly understated in the field studies. In the field, once a person passes the polygraph, the investigation of that person is typically at an end. Thus most false negatives slip through the system. See Patrick & Iacono, 76 J. Applied Psychol., at 237 ("a guilty subject who produced a truthful score would almost never be discovered because there would be no reason to continue investigating him or her"); see also Giannelli, *supra*, 30 Crim. L. Bull., at 270 ("error rates frequently cited by field examiners are suspect because they are often based on the assumption that polygraph results are correct unless proven otherwise").

It is possible to "beat" a polygraph test. While ethical and practical considerations prevent countermeasures from being tested in the field, several careful laboratory experiments have shown that people can be trained to deceive polygraphs. Researchers have found that "training in simple physical maneuvers, such as biting the tongue or pressing the toes on the floor, can be effective in defeating the polygraph tests by enhancing physiological reactions to control questions." Honts, Raskin, & Kircher, Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests, 79 J. Applied Psychol. 252 (1994).

Honts, Raskin, and Kircher repeated such results. In their experiment, a portion of the subjects were told to go to a room and steal a rare coin. *Id.*, at 253. These subjects were told that if anyone other than the experimenter found them out, they might be arrested. *Ibid.* Of the stealing subjects, some were trained in countermeasures while others were not. Finally, another set of subjects did not engage in the mock theft. All of the subjects knew that they would take a polygraph regarding the theft at a later date. *Ibid.*

The countermeasures were either physical, pressing one's toes or biting the tongue, or mental, counting backwards by 7s from a number larger than 200. *Ibid.* The subjects were trained to employ these countermeasures when the control questions were being asked. *Ibid.* The training took 30 minutes.

The results were startling. Only 26% of those who said they complied with the countermeasures failed to the polygraph test. *Id.*, at 255. Furthermore, the polygraphers rarely detected the countermeasures. Only 12% of those using physical countermeasures were caught, and none of those using mental countermeasures were caught. However, 15% of innocent suspects were falsely accused of using countermeasures. *Id.*, at 256. As the authors, important advocates of the polygraph,<sup>9</sup> recognized, "[t]he results of the present study strongly suggest that control question polygraph tests may be defeated by guilty subjects trained in the use of physical or mental countermeasures." *Id.*, at 257.

These countermeasures were not difficult to learn or employ. There is at least anecdotal evidence that a prisoner successfully taught fellow inmates similar countermeasures. See D. Lykken, A Tremor in the Blood 240-241 (1981); see also Lykken, The Validity of Tests: Caveat Emptor, 27 Jurimetrics J. 263, 267 (1987) (noting informal study in which 24 of 27 inmates given 15-minute instruction beat polygraph tests concerning prison rules violations). If the decision below is upheld and the use of polygraphs in court spreads, this knowledge will become more and more common. As the knowledge of countermeasures spreads, it will inevitably wind its way through our criminal population.

9. One of the authors, David Raskin, is considered a leading scientific proponent of polygraphs. See Bashore & Rapp, Are There Alternatives to Traditional Polygraph Procedures? 113 Psychol. Bull. 3, 4 (1993).



Although some may not learn, there will be many offenders with knowledge of polygraph countermeasures, and at least some of these will use them successfully.

*Amicus* submits that if polygraphs become institutionalized in the criminal courts, they will become increasingly a tool for freeing the guilty. The high false positive rate may ensure that relatively few truly innocent defendants will risk the polygraph. Guilty defendants, however, have less to lose, particularly if they know a few simple countermeasures. Over time, the polygraph should thus be expected to primarily exculpate the guilty, turning the polygraph from a confession machine into a true tool of injustice.

### III. Military Rule of Evidence 707's *per se* exclusion of polygraph evidence does not violate defendant's right to present evidence.

Some limits on a defendant's ability to present evidence can be unconstitutional. Under *Rock v. Arkansas*, 483 U. S. 44 (1987) and *Chambers v. Mississippi*, 410 U. S. 284 (1973), defendants have a carefully circumscribed right to present evidence. This right is much narrower than the general right invented by the court below, and is not violated by Military Rule of Evidence 707's prohibition of polygraph evidence.

*Chambers* was a very reasonable response to a very unreasonable situation. Chambers was convicted of shooting and killing a police officer, Aaron Liberty, during a melee between a small mob and a group of police officers trying to effect an arrest. See 410 U. S., at 285-286. Another man, McDonald, subsequently confessed to Chambers' attorneys that he had killed Officer Liberty. *Id.*, at 287. Later, McDonald repudiated his confession. *Id.*, at 288.

Part of Chambers' defense was that McDonald had committed the killing, but he was not allowed to present evidence that McDonald confessed on four separate occasions. See *id.*, at 289. Chambers could not cross-examine McDonald about his confession because Mississippi followed the common law rule that a

party could not impeach his own witness.<sup>10</sup> *Id.*, at 295. Chambers was defeated in his attempt to bring in the testimony of three people to whom McDonald confessed on the grounds that they were hearsay. *Id.*, at 298.

While the Court found the illogical and heavily criticized voucher rule to violate defendant's confrontation rights, it did not reverse the conviction on the voucher rule alone. See *ibid.* Mississippi's use of the hearsay rule, when combined with the confrontation violation, mandated reversal.

While Mississippi admitted hearsay statements made against pecuniary interest, it did not admit statements made against penal interest like McDonald's confessions. *Id.*, at 299. The *Chambers* Court did not categorically forbid state hearsay rules from excluding exculpatory third-party confessions. See *id.*, at 300. Instead, *Chambers* relied on the fact that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Ibid.* The indicia of reliability were both numerous and strong. Three confessions were made. They were made spontaneously to close acquaintances soon after the shooting. They were decidedly against McDonald's self-interest, and, finally, McDonald was present for cross-examination. See *id.*, at 300-301. Given this unique combination, exclusion of the evidence violated Chambers' right to present evidence on his behalf.

The strength of Chambers' fact-specific claim demonstrates that this right is very limited. "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.*, at 302. Exceptions to the hearsay rule admitting inherently trustworthy evidence were long accepted, and defendant's evidence "was well within the basic rationale." *Ibid.* Furthermore, "[t]hat testimony also was *critical* to Chambers' defense." *Ibid.* (emphasis added). Therefore, "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of

10. Chambers' motion to call McDonald and examine him as an adverse witness was denied by the trial court. See *id.*, at 291-292.



guilt are implicated, the hearsay rule may not be applied *mechanistically* to defeat the ends of justice." *Ibid.* (emphasis added).

The prohibition against polygraphs is far removed from this narrow, fact-specific holding. There is no strongly reliable confession of a third party in the present case. The polygraph has neither a theoretical nor an empirical basis for its professed validity as a lie detector. See part I C, *ante*, at 19-22. It is no more than a confession-generating machine. See *ante*, at 15. This machine consistently identifies many innocents as guilty, see *ante*, at 17, and has consistently promised much more than it has delivered. See part I A, *ante*, at 5-7. There is nothing *mechanistic* about this rule of evidence. By banning the polygraph from the courts, Military Rule of Evidence 707 saves innocents and helps convict the guilty. See part II, *ante*. No policy can be more important to the criminal justice system.

*Chambers* "establish[ed] no new principles of constitutional law." *Chambers*, 410 U. S., at 302. It did nothing to diminish "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*, at 302-303. Instead, "we hold quite simply that under the *facts and circumstances of this case* the rulings of the trial court deprived *Chambers* of a fair trial." *Ibid.* (emphasis added). This cannot invalidate the important policies and very different circumstances found in the present case.

*Rock v. Arkansas*, *supra*, is as readily distinguished. The *Rock* Court dealt with a "*per se* rule excluding a criminal defendant's hypnotically refreshed testimony." 483 U. S., at 49. Defendant's claim was based on her right to testify on her own behalf. The *Rock* Court drew this right from several constitutional provisions, see *id.*, at 51, and its own decisions, including *Chambers*. See *id.*, at 55. It concluded that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.*, at 55-56.

The present case is most easily distinguished from *Rock* because it does not involve defendant's own testimony. *Rock* was convicted of manslaughter, see *id.*, at 48, a crime for which there will often be few witnesses. Preventing defendant from testifying will thus often devastate the defense. See *id.*, at 57. *Rock* took care to distinguish the rules of other states excluding hypnotically

refreshed testimony, noting that they apply to "the testimony of witnesses, not . . . the testimony of the defendant." *Ibid.* (emphasis in original); *id.*, at 58.

One of the many problems with polygraph evidence is that it is much less relevant than it appears. An exculpatory polygraph is only relevant to bolster the credibility of a defendant who testifies. See, e.g., 3A J. Wigmore, Evidence § 990 (Chadbourn rev. 1970); *Regina v. B  land*, [1987] 2 S. C. R. 398, 415, 43 D. L. R. 4th 641, 654 (Canada). This relevance is diminished by the polygraph's inaccuracy—its high false positive and understated false negative rates. See *ante*, at 17-21.

This diminished relevance stands against the polygraph's inherently high risk of prejudicing the jury. This alleged truth machine appeals to a "simplistic desire for certainty . . . ." Steinbrook, The Polygraph Test—A Flawed Diagnostic Method, 327 New Eng. J. Med. 122, 123 (1992). There is thus the inevitable risk that the jury will place too much weight on an all too fallible lie test "which nonetheless possesses an aura of scientific truth." Alpher & Blanton, The Accuracy of Lie Detection: Why Lie Tests Based on the Polygraph Should Not Be Admitted Into Evidence Today, 9 Law & Psychol. Rev. 67, 68-69 (1985); *United States v. Alexander*, 526 F. 2d 161, 168 (CA8 1975) ("When polygraph evidence is offered . . . it is likely to be shrouded with an aura of near infallibility, akin to the ancient Oracle of Delphi"). Common sense says that the jury is likely to believe, and rely on, an "expert" "scientist" who gives simple, direct testimony that sounds as if it is at the heart of the issue.

"Uncertainty is painful to the decision maker. Complicated evidence can only be evaluated subjectively and subjectivity leads to doubt and disagreement. One longs for some straightforward, definitive datum that will resolve the conflict and impel a conclusion. This longing not infrequently leads one to invest any simple, quantitative, or otherwise specific bit of evidence with a greater weight than it deserves, with a predictive power that it does not really possess. In decision making, the objective dominates the subjective, the simple squeezes out the complicated, the quantitative gets more weight than the nonmetrial, dichotomous (yes/no, pass/fail) evidence supersedes the many-valued." D. Lykken, A Tremor in the Blood 69 (1981); see also *Alexander*, 526 F. 2d, at 168.

This balance must also take into account the role of the jury in determining credibility. Determining credibility is the "special province of the trier of fact." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U. S. 844, 856 (1982). The jury thus does not need an expert's assistance to determine whether a witness is lying. The polygraph is no more than a mechanical intrusion upon the jury. See, e.g., *State v. Porter*, 241 Conn. 57, 1997 WL 265202 \*27 (May 20, 1997); *Béland, supra*, 2 S. C. R., at 415-416, 43 D. L. R. 4th, at 654; *People v. Baynes*, 430 N. E. 2d 1070, 1079 (Ill. 1981) ("A trial by polygraph is an unwarranted intrusion into the jury function"); *Commonwealth v. Mendes*, 547 N. E. 2d 35, 41 (Mass. 1989); cf. *United States v. Bursten*, 560 F. 2d 779, 785 (CA7 1977) ("trial by machine"). The President's decision to ban polygraphs reflects the truth that the polygraph's prejudicial effect far outweighs any probative value it may have. See *Porter, supra*, 1997 WL, at \*26.

*Rock* applied a balance of interests test to limits on defendant's testimony. See 483 U. S., at 56. Applying interest-related balancing tests to state criminal rules and procedures is normally disfavored. See *Medina v. California*, 505 U. S. 437, 443 (1992). *Rock* should thus not be loosed upon all the rules of evidence, but instead limited to protecting defendant's own testimony. Even if *Rock* exceeds these bounds, the balance of interests noted above clearly favors Military Rule of Evidence 707. There is nothing "arbitrary" about the President's decision. Nor are the overwhelming majority of the states acting arbitrarily when they reject polygraph evidence. See *Mendes, supra*, 547 N. E. 2d, at 39-40.

The decision below represents a dangerous expansion of this Court's right-to-present-evidence jurisprudence. Its focus on Military Rule of Evidence 707's status as *per se* rule, finding this to be a violation of *Rock*, see 44 M. J., at 446, threatens to overturn many rules of evidence. There are many *per se* rules that exclude relevant evidence. Privileges, see Fed. R. Evid. 501, competency requirements, see Fed. R. Evid. 605-606, and rape shield laws, see Fed. R. Evid. 412, are just some of the evidentiary rules that exclude entire categories of evidence.

The fact that some of these rules contain exceptions, see Fed. R. Evid. 412(b), would not exempt them from the decision below. What bothered the lower court was that Military Rule of Evidence 707 "bars otherwise admissible and relevant evidence

based on the mode of proof by categorically excluding polygraph evidence." *Scheffer*, 44 M. J., at 448. The Court of Appeals emphasized *Rock*'s statement that a rule cannot *per se* exclude evidence "that may be reliable in an individual case." *Id.*, at 446 (quoting *Rock, supra*, 483 U. S., at 61). Therefore, the trial court must be allowed to be the gatekeeper of polygraph evidence, making its own determination as to whether the polygraph is admissible. See *ibid.* (" 'We do not hold now that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility' " (quoting *United States v. Posado*, 57 F. 3d 428, 434 (CA5 1995) (emphasis added))). Privileges, competency, and the rape shield all keep entire categories of relevant evidence from the trial court. If *Rock*, as interpreted by the lower court, is not limited to defendant's own testimony, see *Scheffer*, 44 M. J., at 446, then these and other exclusionary rules are unconstitutional.

The court below has transferred responsibility for determining the admissibility of a class of evidence from the rulemaker, in this case the President, to a trial court acting as a "gatekeeper" under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 597 (1993). This effectively raises *Daubert* to constitutional status. States will no longer be able to exclude categories of evidence with respect to criminal defendants. Instead, the trial court will engage in a general balancing of relevance, reliability, and prejudice. It is senseless to impose such *ad hoc* admissibility on the nation. The rules of evidence should be left to the rulemakers, whether federal or state, and whether executive, legislative, or judicial. The fact that a federal court may consider *Daubert* a better approach to deciding whether scientific evidence is admissible does not give that decision constitutional status. See *Mu'Min v. Virginia*, 500 U. S. 415, 430-431 (1991) (the fact that a rule is "better" does not incorporate it into the Fourteenth Amendment). This Court should give the rulemakers their deserved freedom. See *Payne v. Tennessee*, 501 U. S. 808, 824 (1991) ("Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States").



The creeping constitutionalization of the law of evidence is not the purpose of the right to present evidence. This right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U. S. 284, 295 (1973); *Washington v. Texas*, 388 U. S. 14, 23, n. 21 (1967) (distinguishing privileges and mental competency requirements). While aware of this, see *Scheffer*, 44 M. J., at 445, the court below failed to properly apply these limits when interpreting *Rock*. Thus the decision below even contradicts *Rock*, which respected these limits. See 483 U. S., at 55, n. 11.

The decision below also contradicts this Court's most recent decision concerning limits on defense evidence. In *Montana v. Egelhoff*, 518 U. S. \_\_\_, 135 L. Ed. 2d 361, 116 S. Ct. 2013 (1996), this Court upheld against constitutional attack a statute excluding the use of voluntary intoxication for determining defendant's state of mind. The plurality explicitly rejected the right-to-present-evidence contention, finding "*Chambers* was an exercise in highly case-specific error connection." *Id.*, at 373, 116 S. Ct., at 2022. It found that *Chambers* did not create an unlimited right to present evidence, "but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Id.*, at 374, 116 S. Ct., at 2022. Limits on defense evidence were constitutional so long as they were supported by a valid state policy. *Ibid.*

Justice Ginsberg's concurrence avoided the right-to-present-evidence issue by recognizing that the Montana statute changed the mens rea for crimes, thus rendering evidence of voluntary intoxication irrelevant. See *id.*, at 377, 116 S. Ct., at 2024-2025. The four dissenters, however, agreed with the plurality's interpretation of the right to present evidence; they only disagreed on the validity of the state's justification in the present case. See *id.*, at 380, 116 S. Ct., at 2027 (O'Connor, J., dissenting) ("limits on evidence may exceed bounds of due process where such limitations undermine a defendant's ability to present exculpatory evidence without serving a *valid* state justification" (emphasis added)).

The limits and dangers of polygraph evidence noted in parts I and II, *ante*, validate the exclusion of polygraphs. This rule does not merely operate to favor the prosecution, see *id.*, at 379-380, 116 S. Ct., at 2026; given the polygraph's usefulness in generating

confessions, it is likely that more inculpatory evidence is excluded than exculpatory polygraphs. Military Rule of Evidence 707 is meant to keep this scientifically invalid machine from undermining the military's justice system.

There is no absolute right to present exculpatory evidence. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U. S. 400, 410 (1988). The right to present evidence should not be expanded into a constitutional evidence code. The decision below threatens to do this and therefore must be struck down.

### CONCLUSION

The decision of the Court of Appeals for the Armed Forces should be reversed.

July, 1997

Respectfully submitted,

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No. 96-1133

Supreme Court, U.S.  
**F I L E D**

AUG 1 1997

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

UNITED STATES OF AMERICA,  
*Petitioner,*  
v.

EDWARD G. SCHEFFER,  
*Respondent,*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Armed Forces

**BRIEF FOR AMICUS CURIAE  
AMERICAN POLYGRAPH ASSOCIATION  
IN SUPPORT OF RESPONDENT**

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**BRIEF FOR AMICUS CURIAE  
AMERICAN POLYGRAPH ASSOCIATION  
IN SUPPORT OF RESPONDENT**

**INTEREST OF AMICUS CURIAE**

The American Polygraph Association (APA) was established in 1966 and is a professional association of over 1,800 polygraph examiners and academic researchers in the private sector, law enforcement, and government fields. The APA was formed by the merger of the Academy of Scientific Interrogation, the American Academy of Polygraph Examiners, the National Board of Polygraph Examiners, and the International Association of Polygraph Examiners.

The objectives of the APA are that of advancing the use of the polygraph as a science and a profession. APA members have a particular interest in ensuring that this Court is informed about the modern polygraph instrument and examination procedure, the current research on the validity of polygraph results, and the legal issues implicated by a *per se* exclusion of polygraph evidence.<sup>1</sup>

**SUMMARY OF ARGUMENT**

I. In order to maintain restrictions on a defendant's Sixth Amendment right to call witnesses in his favor, petitioner must demonstrate that such restriction is not arbitrary or disproportionate to the purpose it is designed to serve. *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). In the context of a complete and wholesale exclusion of a class of scientific evidence, petitioner bears the burden of repudiating, by clear evidence, its validity. *Rock* at 61.

Petitioner's attempt to establish an artificially low standard of review for *per se* restrictions on a class of scientific evidence—that the *per se* exclusion of polygraph evidence is constitutional so long as it is reasonable and

<sup>1</sup> Consent letters have been filed with the clerk.



serves a legitimate interest—is based on the general principle that a defendant's right to present relevant evidence in his defense is not absolute. While Amicus does not dispute this general principle, *Rock* and *Chambers* demonstrate that it is not the controlling principle where a wholesale exclusion of a class of scientific evidence is under review.

II. In the wake of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), a number of federal circuit courts of appeals, recognizing the advances made in polygraph instrumentation, technique, and research, have rejected judicially-imposed *per se* rules against the admissibility of polygraphs. This trend is continuing, and several federal district courts have, applying a *Daubert* analysis, found polygraph evidence admissible.

III. The modern polygraph instrument and testing technique has undergone a great deal of improvement and scientific validity testing. The scientific literature indicates that the control question polygraph technique has high accuracy rates in the average range of 90%; an accuracy rate considerably better than some traditionally accepted types of evidence. Additionally, improvements in the education and training of polygraph examiners have enhanced the reliability of polygraphs.

IV. Research does not support petitioner's argument that a trier of fact would be unduly swayed by polygraph evidence. Further, polygraph evidence is not unique as an indicator of witness credibility and does not impermissibly intrude on the function of the jury.

V. The admission of polygraph evidence will not unreasonably burden the courts. States may establish reasonable guidelines for the admission of polygraph evidence at trial.

## ARGUMENT AND AUTHORITY

### I. THE *PER SE* EXCLUSION OF POLYGRAPH EVIDENCE BY MILITARY RULE OF EVIDENCE 707 VIOLATES RESPONDENT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

In *United States v. Scheffer*, 44 M.J. 442 (C.M.A. 1996), it was held that where the defendant "testified, placed his credibility in issue, and was accused by the prosecution of being a liar," the "*per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil.R.Evid. 702 and *Daubert*, violates his Sixth Amendment right to present a defense." 44 M.J. at 445. The Court of Military Appeals relied, in part, on the framework for examining constitutional challenges to *per se* exclusions of evidence set out in *Rock v. Arkansas*, 483 U.S. 44 (1987),<sup>2</sup> and the general approach of relaxing the traditional barriers to expert opinion testimony discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).<sup>3</sup>

In *Rock*, this Court reversed Arkansas' *per se* exclusion of hypnotically-refreshed testimony that had worked to limit the testimony of the defendant. Finding defendant's right to testify to be a fundamental right, *Id.* at 51-53, this Court observed:

restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

*Id.* at 55-56. In order to demonstrate that a complete and wholesale exclusion of a class of scientific evidence was not arbitrary and disproportionate to the purpose it was designed to serve, this Court placed on the state of Arkan-

<sup>2</sup> *United States v. Scheffer*, 44 M.J. at 445-446.

<sup>3</sup> *Id.* at 446.

sas the burden of repudiating, by clear evidence, the validity of all post-hypnosis recollections. As set forth by the Court:

A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections.

*Id.* at 61. As a defendant's right to present evidence in his or her defense is a fundamental right,<sup>4</sup> petitioner's wholesale exclusion of polygraph evidence found in Mil.R. Evid. 707 should be tested against the same standard for arbitrariness and disproportionality, as was hypnotically-refreshed testimony in *Rock*, requiring a clear demonstration from respondent of the unreliability of polygraph evidence in all cases.

Petitioner views *Rock* more narrowly, drawing a distinction between the constitutional right of a defendant to testify on his own behalf as opposed to calling witnesses in his favor. Petitioner's Brief at 35. However, in reaching its conclusion that "Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf," 483 U.S. at 62, this Court did not limit its analysis to the testimony of the defendant. In *Rock*, this Court relied, in part, on its decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), where a state's hearsay rule was determined to be unconstitutional on the ground that it abridged a defendant's right to present witnesses in his own defense. *Rock*, 483 U.S. at 55. In *Chambers*, this Court held Mississippi to the same burden of demonstrat-

<sup>4</sup> This Court observed in *Rock* that "the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' logically includes 'the accused's right to call witnesses whose testimony is 'material and favorable to his defense.'" *Rock* at 52 (citing *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

ing the unreliability of the proffered testimony of a witness for the defense. Summarizing *Chambers*, this Court noted in *Rock*:

In the Court's view, *the State in Chambers did not demonstrate that the hearsay testimony in that case, which bore "assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony.*

*Rock* at 55 (emphasis added).

The court in *United States v. Scheffer* observed that the defendant's testimony in *Rock* and the presentation of polygraph evidence in the present case concerning exclusion of evidence supported the truthfulness of the defendant's testimony and could "perceive no significant constitutional difference between the two" because "[i]n either case, the Sixth Amendment right to present a defense is implicated."<sup>5</sup> 44 M.J. at 446. A similar unwillingness to confine *Rock* to testimony of a criminal defendant was expressed in J. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, 1996 U. Ill. L. Rev. 363 (1996) [hereinafter McCall, *Misconceptions and Reevaluation*]. There, the author stated that *Rock* established the basic components in developing a constitutional right to introduce exculpatory evidence in criminal trials (McCall, *Misconceptions and Reevaluation*, at 392) and concluded that "[t]he *Rock* opinion is most logically read to establish a Sixth Amendment right to call exculpatory witnesses whose testimony may be subject to a known, but manageable, risk of inaccuracy." *Id.* at 408.

Petitioner ignores the analysis in *Rock* and *Chambers* and argues that *per se* restrictions on evidence are constitutional merely "if they are reasonable and serve legi-

<sup>5</sup> Although not discussed in *Rock*, it is reasonable to presume that *Rock* would also encompass the defendant's right to call an expert regarding the science of hypnotically-refreshed testimony.



imate interests." Petitioner's Brief at 14. Petitioner's attempt to establish an artificially low standard of review is based primarily on the general principle that "a defendant's right to present relevant evidence in his defense is not absolute" and must follow established evidentiary rules. Petitioner's Brief at 15. Amicus does not dispute this general principle but does dispute that it is the controlling principle when the precise issue is a *per se* exclusionary rule.

On this basis, petitioner's citation to *Crane v. Kentucky*, 476 U.S. 683 (1986), and *Montana v. Egelhoff*, — U.S. —, 116 S. Ct. 2013 (1996), is unpersuasive. *Crane* did not address a *per se* exclusion of a class of evidence but addressed a trial court's determination not to allow testimony about the circumstances of a defendant's confession. In that context, though reversing the trial court's decision, this Court reaffirmed those cases granting trial courts wide latitude in making evidentiary decisions. *Egelhoff* addressed a Montana statute that excluded evidence of voluntary intoxication when a defendant's state of mind is at issue. That decision was based on the power of a state to define crimes and defenses, not on the type of *per se* exclusionary rule of evidence addressed in *Rock*, *Chambers*, and the present case.

Accordingly, the issue is not whether respondent's *per se* exclusion of polygraph evidence is reasonable and serves a legitimate interest but, rather, in the circumstances of this case, whether respondent has clearly demonstrated that polygraph evidence is unreliable in all cases. Under either test, however, the *per se* exclusion of polygraph evidence under Mil.R.Evid. 707 violates a defendant's Sixth Amendment right to present a defense.

## II. THERE IS INCREASING JUDICIAL SUPPORT FOR REMOVAL OF EVIDENTIARY BARRIERS TO POLYGRAPH EVIDENCE

Petitioner claims that the reasonableness of a *per se* exclusionary rule for polygraph evidence is supported in part by "[w]idespread judicial support for a prohibition on

polygraph admissibility." Petitioner's Brief at 31. Petitioner's argument fails to acknowledge in an adequate manner the recent decisions of federal circuit courts of appeals, especially those after *Daubert*, which have removed the evidentiary barriers to polygraph evidence.

The stage was set in the circuit courts in a pre-*Daubert* decision, *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989). There, a criminal conviction was vacated and the case was remanded to reconsider the admissibility of the defendant's polygraph test results. The court of appeals, observing "tremendous advances" in polygraph instrumentation and technique and the progress in the science of polygraphy, reasoned that even under a strict adherence to the traditional standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "it is no longer accurate to state categorically that polygraph testing lacks general acceptance for use in all circumstances." *United States v. Piccinonna*, 885 F.2d at 1532.

This Court's decision in *Daubert* led a number of circuit courts of appeals to join the Eleventh Circuit decision in *Piccinonna* and withdraw the *per se* rule of inadmissibility of polygraph evidence. Other leading circuit court of appeals decisions reflecting this change include *United States v. Kwong*, 69 F.3d 663, 668-69 (2d Cir. 1995), — U.S. —, *cert. denied*, 116 S. Ct. 1343 (1996) ("assuming that polygraph results are admissible under Rule 702," but not reaching that holding because the record was insufficiently developed and the results were properly excluded under Rule 403), *United States v. Posado*, 57 F.3d 428, 432 (5th Cir. 1995) (after *Daubert*, a *per se* rule is "no longer viable"); *United States v. Sherlin*, 67 F.3d 1208, 1216 (6th Cir. 1995) (the decision to exclude polygraph evidence is "within the sound discretion of the trial court," but was properly excluded here under Rule 403); *United States v. Williams*, 95 F.3d 723 (8th Cir. 1996) (discussing the offer of polygraph evidence under a *Daubert* analysis, but holding that the district court did not abuse its discretion in excluding the evidence under Rule 403); and *United States v. Cordoba*, 104 F.3d 225,



228 (9th Cir. 1997) ("we hold that *Daubert* effectively overruled . . . [the] per se rule under Rule 702 against admission of unstipulated polygraph evidence").

The rationale for the elimination of judicially-imposed *per se* exclusions of polygraph evidence may have been best explained by the Fifth Circuit Court of Appeals in *Posado*:

Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we routinely find admissible under Rule 702.

57 F.3d at 434 (footnotes omitted). Therefore, contrary to petitioner's suggestion, there is widespread and increasing support for removing the barriers to polygraph evidence.

Petitioner concedes that "several courts of appeals have retreated from the categorical exclusion of polygraph evidence," but that no court of appeals has concluded that polygraph testing is scientifically valid or that the results of a polygraph test were reliable enough to be admitted into evidence. Petitioner's Brief at 33-34. Petitioner fails to note that it is only recently that the circuit courts of appeals, in the wake of *Daubert*, have begun issuing opinions withdrawing judicially-imposed *per se* rules against polygraph admissibility. In fact, district court decisions are now emerging wherein the trial court judges have performed a *Daubert* analysis and determined that polygraph evidence is admissible in certain circumstances and for certain purposes. See, e.g., *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995). These carefully considered opinions indicate that district courts are able to perform the "gatekeeper" role which this Court stated in *Daubert* it expected them to perform.

### III. THE WEIGHT OF SCIENTIFIC RESEARCH SUPPORTS THE USE AND RELIABILITY OF POLYGRAPHS

#### A. The Polygraph Instrument and Testing Technique

The polygraph instrument and testing technique used for modern physiological assessment of deception bears little similarity to the instrument and technique assessed by the court in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).<sup>6</sup> As described in *United States v. Galbreth*, 908 F. Supp. 877, 883 (D.N.M. 1995):

The machine scrutinized in *Frye* was a standard blood pressure type device comprised of a microphone and a cuff that measured the subject's blood pressure. The examiner asked the subject a series of questions during which time the examiner periodically took the subject's blood pressure.

These blood pressure recordings were not continuous and no apparent formal analysis was conducted. C. Honts & B. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. Rev. 987, n.3 (1995) [hereinafter Honts & Quick, *The Polygraph in 1995*].

The modern polygraph instrument "record[s] measures from at least three physiological systems that are controlled by the autonomic nervous system." *Id.* at 989-90. As summarized in *Galbreth*, 908 F. Supp. at 883:

It measures respiration at two points on the body; on the upper chest, the thoracic respiration, and on the abdomen, the abdominal respiration. Movements of the body associated with breathing are recorded such that the rate and depth of inspiration and expiration can be measured. The polygraph machine also measures skin conductance or galvanic skin response. Electrodes attached to the subject's finger-

<sup>6</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993) ("[t]he *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine").

tip or palm of the hand indicate changes in the sweat gland activity in those areas. In addition, the polygraph measures increases in blood pressure and changes in the heart rate. This measurement, known as the cardiovascular measurement, is obtained by placing a standard blood pressure cuff on the subject's upper arm. Finally, the polygraph may also measure, by means of a *plethysmograph*, blood supply changes in the skin which occur as blood vessels in the skin of the finger constrict due to stimulation.

See also D. Olsen et al., *Recent Developments in Polygraph Technology*, 12 Johns Hopkins Applied Physics Laboratory, Technical Digest 347, 348 (1991) [hereinafter Olsen et al., *Recent Developments*]; D. Weinstein, *Anatomy and Physiology for the Forensic Psychophysicologist*, Department of Defense Polygraph Institute (1994). There is little controversy in the scientific literature regarding the accuracy of these recordings of physiological responses. 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* 217 (2d ed. 1993) [hereinafter Giannelli & Imwinkelried, *Scientific Evidence* 2d].

Stated briefly, the scientific theory underlying modern polygraph assessment of deception is that due either to "cognitive processing or emotional stress," there are recordable and measurable physiological reactions to deceptive responses, such as a response to a question involving the matter under investigation which the subject is unable to inhibit. Olsen et al., *Recent Developments*, at 347. As described in *United States v. Galbreth*, 908 F. Supp. at 884:

the underlying scientific theory upon which the modern polygraph technique is based is derived from the notion that if a person is threatened or concerned about a stimulus or question, such as a question addressing the matter under investigation, that this concern will express itself in terms of measurable physiological reactions which the subject is unable to inhibit and which can be recorded on a polygraph instrument.

Until approximately 1950, most polygraph testing used the relevant/irrelevant (R/I) question format. McCall, *Misconceptions and Reevaluation*, at 378. Generally, the R/I test compares the relative physiological reactivity of irrelevant questions (questions not related to the matter under investigation) and relevant questions (questions pertaining to the matter under investigation). *Id.* at 410 n.333. Since its development in 1947,<sup>7</sup> the control question (CQ) format has been the most widely used polygraph technique.<sup>8</sup> Rather than comparing the relative physiological reactivity of relevant and irrelevant questions, the CQ technique compares relative physiological reactivity of deceptive responses to troubling but inconsequential questions (control questions) and relevant questions. The CQ test is summarized as follows:

In the CQ test, the subject is asked to answer a number of "control" (meaning stressful, but logically distinct from the incident that is the subject of the examination) questions that are intended to provoke anxiety and a false denial. Thus, if the person being examined is suspected of committing a theft on January 10, 1996, a valid control question would be, "During the five year period from January 1, 1991, to December 31, 1995, do you remember stealing anything?" The assumption is that the subject will answer in the negative but suffer some doubts and experience anxiety (and show a strong physiological reaction) in considering the question. Relevant questions relating to the incident under investigation ("Did you steal the wallet of your coworker on January 10, 1996?") are interspersed among the control

<sup>7</sup> J. Reid, *A Revised Questioning Technique in Lie-Detection Tests*, 37 J. Crim. L. & Criminology (1947). The CQ format is, today, a family of related techniques, all derived from Reid's original procedure. J. Matte, *Forensic Psychophysiology Using the Polygraph: Scientific Truth Verification—Lie Detection* 250 (1996) [hereinafter Matte, *Forensic Psychophysiology*].

<sup>8</sup> The R/I continues to be a popular technique in employee screening situations. P. Minor, *The Relevant-Irrelevant Technique*, in *The Complete Polygraph Handbook* 143 (S. Abrams ed. 1989).



questions. An innocent subject will show significantly less physiological reaction when truthfully denying the relevant questions than when denying the control questions.

*Id.* at 411 n.339. Irrelevant questions are interspersed as buffers. Olsen et al., *Recent Developments*, at 348.

A standard polygraph examination consists of a pre-test interview, polygraph testing, and analysis of the polygraph data. The pre-test interview serves a variety of functions, including: to "acquaint the subject with the effectiveness of the technique," thus allaying the apprehensions of the truthful subject and stimulating the deceptive subject's concern about the prospect of detection; to "assess the suitability of the subject for testing" and to develop information for formulation of polygraph test questions. Giannelli & Imwinkelried, *Scientific Evidence* 2d at 219 (footnotes omitted). The court in *Galbreth* describes additional functions of the pre-test interview as: introduction of the control question in such a way as to elicit a deceptive response; advance review of questions to avoid surprise; to prevent the need of the subject to analyze the meaning of a question; and to ensure the understanding of any terms used in the questions. *Galbreth*, 908 F. Supp. at 884-885.<sup>9</sup>

The examination is ordinarily conducted in a testing room, devoid of external distractions. S. Abrams, *The*

<sup>9</sup> Petitioner acknowledges that "[t]here is no doubt that the polygraph can accurately measure certain physiological responses to accusatory questioning and that a correlation appears to exist between a fear of detection and a subject's physiological response." Petitioner's Brief at 21 n.7. Petitioner questions whether these physiological responses might be confused with "responses caused by other emotions." *Id.* As set forth in the text, the pre-test interview is designed to minimize physiological responses due to these other emotions or extrinsic factors. This, along with a properly constructed testing room, the repetition of the test in two or more charts, and the post-test interview further serve to minimize extrinsic factors affecting the test. The success of minimizing these factors is demonstrated in the high accuracy rates reported for polygraph testing in the scientific literature.

*Complete Polygraph Handbook* 37 (1989). During the actual examination, a series of tests,<sup>10</sup> asking the same questions but in a different order, are given. This is to ensure that there is consistent physiological response to the same questions, thus reducing the potential that outside stimuli influence test results. *Id.* at 71. Physiological responses are recorded on a moving chart. During the testing, the examiner makes appropriate markings on the chart to indicate where each question is asked and answered and whether there are interfering factors which occurred that may have affected a subject's response to a particular question. *Id.* at 37.

Test interpretation is made by comparing the relative reactivity to control and relevant questions. A numerical scoring system is ordinarily employed which literally calls for measuring and comparing the rise and duration of physiological response. *Id.* at 74. Hence, judgments about the difference between responses to the relevant and control questions are minimized. In the last ten years, algorithms have been developed which allow computer-assisted chart interpretation. Olsen et al., *Recent Developments*, at 349.

Quality control, in the form of "blind" chart interpretation by a non-examining polygrapher, without knowledge of the original examiner's conclusions, is often employed by private examiners and typically employed by federal agency examiners to ensure agreement in interpretation. See Giannelli & Imwinkelried, *Scientific Evidence* 2d, at 223. A polygraph test may be interpreted as no deception indicated (NDI), deception indicated (DI), or inconclusive (IC).

Typically, following a polygraph examination, a post-test interview is conducted in which the results of the polygraph are conveyed to the subject and the subject is interviewed to determine, in part, if there was any external

<sup>10</sup> Typically, two to five charts (test repetitions) are obtained. Olsen et al., *Recent Developments*, at 347; Giannelli & Imwinkelried, *Scientific Evidence* 2d, at 221.



stimuli that may have influenced the test. S. Abrams, *The Complete Polygraph Handbook* 85 (1989).

### B. Scientific Study of the Polygraph

In 1983 and 1984, two federally-sponsored reviews of the then available scientific literature regarding polygraph were issued. The first was issued by the Office of Technology Assessment of the U.S. Congress. U.S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation*, OTA-TM-H-15 (1983) [hereinafter OTA Report]. The second was issued by the U.S. Department of Defense. U.S. Department of Defense, *The Accuracy and Utility of Polygraph Testing* 2 (1984) [hereinafter DoD Report]. Each of these reviews is considered herein along with several subsequent reviews of some of the more recent scientific literature.

In February 1983 the Committee of Government Operations, U.S. House of Representatives, in response to a Presidential National Security Decision Directive (NSDD-84) which authorized increased use of polygraph examination for security screening of federal employees and civilian contractors with access to highly classified information, formally requested the Office of Technology Assessment of the U.S. Congress to conduct a review of the scientific literature on the validity of polygraph testing.

The OTA determined that there were ten field studies<sup>11</sup> and fourteen analog studies<sup>12</sup> on the validity of the CQ

<sup>11</sup> "Field studies investigate actual polygraph examinations and constitute the most direct evidence for polygraph test validity." OTA Report at 47 (endnote omitted). The primary problem in field studies is establishing ground truth, i.e., objectively determining the actual truth-tellers so they may be compared with the test outcomes.

<sup>12</sup> Analog, or laboratory, studies are investigations in which field methods of polygraph examinations are used in simulated situations. OTA Report at 61. Analog studies are typically conducted by having a portion of the subjects commit a mock crime and instructing

which met their scientific criteria. OTA Report at 97. Summarizing their review, the OTA found that those studies employing the CQ in specific incident criminal investigations found average accuracy rates in field studies of 86.3% correct detection of guilty subjects and 76% correct detection of innocent subjects. *Id.* In analog studies, the accuracy was 63.7% correct detection of guilty subjects and 57.9% correct detection of innocent subjects. *Id.* However, these average accuracy results were skewed down as the OTA chose to identify inconclusive findings as errors on the basis that "an inconclusive is an error in the sense that a guilty or innocent person has not been correctly identified." *Id.* The OTA acknowledged that exclusion of inconclusives would raise the overall accuracy rate.<sup>13</sup> *Id.* The OTA did acknowledge, though critical of its study selection, a then recent "important review" which found an average field study validity of 97.2% and analog study validity of 93.2%. *Id.* at 41, citing N. Ansley, *A Review of the Scientific Literature on the Validity, Reliability and Utility of Polygraph Techniques* (Ft. Meade, Md.: National Security Agency (1983)) (found at 125 n.7).

The OTA determined that personnel security screening involved "a different type of polygraph test than specific-incident investigations" and observed that "very little screening research has been conducted" and, for that reason

them to lie about it during the polygraph test. Analog studies are sometimes criticized for their lack of realism. Honts & Quick, *The Polygraph in 1995*, at 994. This problem is reduced by offering incentives associated with the outcome of the test. *Id.* at 994 n.48.

<sup>13</sup> While inconclusives may impact the utility of the polygraph, they do not impact accuracy inasmuch as an inconclusive decision would not reflect a bad judgment but, rather, reflects insufficient information to make a decision. As explained in the DoD Report at 61:

Even the most accurate test has diminishing utility as the inconclusive rate increases. Fingerprints, for example, have limited utility in investigations despite their extremely high accuracy because only occasionally can identifiable prints be recovered.

found that the scientific basis for the use of polygraph for *personnel screening* was not established. OTA Report at 99-100. The OTA did determine that

[t]he preponderance of research evidence does indicate that, when the control question technique is used in specific-incident criminal investigations, the polygraph detects deception at a rate better than chance, but with error rates that could be considered significant.

*Id.* at 97. The OTA urged further research and set out priorities for such research. *Id.* at 101-102.

In 1984, at the request of the Deputy Under Secretary of Defense, the Department of Defense issued a report which surveyed the then existing scientific literature regarding polygraph testing. DoD Report at 2. Observing that there has been more scientific research conducted on polygraph testing "in the last six years than in the previous 60 years," the authors of the DoD Report included a larger group of studies in its review than did the authors of the OTA Report. *Id.* at 58. Field studies reviewed demonstrated 90 to 100 percent accurate classification of guilty subjects and 85 to 100 percent accurate classification of innocent subjects after exclusion of inconclusive results. *Id.* at 37-38. Analog studies were found to

correctly classify from 75% to 100% of the guilty subjects and from 57% to 100% of the innocent subjects. The mean correct classification rate weighed for number of subjects in the study is 90% for guilty subjects and 80% for innocent subjects.

*Id.* at 62. In its overview, the DoD observed that while there were some limitations on the scientific research, "the research produces results significantly above chance." *Id.* at 3.

Since the OTA Report and DoD Report, there have been significant technological advances in polygraph instrumen-

tation and an increase in research in the field of physiological detection of deception and better education and training of examiners:

The period between 1986 and the present has been one of unparalleled advances in the psychophysiological detection of deception testing procedures and processes. . . . More sensitive sensors; more efficient transducers; improved means of digitizing and recording physiological data; digitizing analog data at increasingly high sample rates; and algorithms to evaluate physiological data in an unlimited fashion, all represent technical innovations that will enhance the advancement of the new and evolving science of forensic psychophysiology.

W. Yankee, *The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception*, 40 J. Forensic Sci. 63, 63 (1995) [hereinafter Yankee, *The Current Status*].

Under the Defense Authorization Act of 1986, the Secretary of Defense was directed to carry out research in the field of physiological detection of deception. Additionally, in 1986, Department of Defense Directive 5210.78 established the Department of Defense Polygraph Institute (DoDPI) as a higher education and research facility. Yankee, *The Current Status*, at 63.

DoDPI's role in polygraph research was described in Matte, *Forensic Psychophysiology*, at 102:

While not all published research relating to PV examinations during the past fifteen years was conducted by DoDPI, its role as a leading research entity certainly gave impetus to other research facilities and individuals . . . to engage in research regarding PV examination test formats, physiological data collection processes, physiological data analysis, diagnostic procedures and the recognition and identification of countermeasures.



Summaries of DoDPI's research are contained in its annual reports to Congress.<sup>14</sup>

In its Annual Report to Congress for Fiscal Year 1990, DoDPI summarized a report prepared by the National Security Agency which reviewed polygraph field studies conducted since 1980. That report, subsequently published in *Polygraph*,<sup>15</sup> considered ten field studies.<sup>16</sup> The ten studies reviewed considered a total of 2,042 examiner decisions, and the results, although excluding inconclusives, assumed that every disagreement was a polygraph error. Average accuracy was 98%. Ansley, *The Validity and Reliability*, at 177. Table 1 of the report sets forth, in part, the following results:

<sup>14</sup> In Yankee, *The Current Status*, the author cites a number of studies either conducted, administered, or contracted by DoDPI.

<sup>15</sup> N. Ansley, *The Validity and Reliability of Polygraph Decisions in Real Cases*, 19 *Polygraph* 169 (1990) [hereinafter Ansley, *The Validity and Reliability*].

<sup>16</sup> L. Arellano, *The Polygraph Examination of Spanish Speaking Subjects*, 19 *Polygraph* 155 (1990); R. Edwards, *A Survey: Reliability of Polygraph Examinations Conducted by Virginia Polygraph Examiners*, 10 *Polygraph* 229 (1981); E. Elaad & E. Schahar, *Polygraph Field Validity*, 14 *Polygraph* 217 (1985); J. Matte & R. Reuss, *A Field Validation Study of the Quadri-Zone Comparison Technique*, 18 *Polygraph* 187 (1989); K. Murray, *Movement Recording Chairs: A Necessity?*, 18 *Polygraph* 15 (1989); C. Patrick & W. Iacono, *Validity and Reliability of the Control Question Polygraph Test: A Scientific Investigation*, 24 *Psychophysiology* 604 (1987); R. Putnam, *Field Accuracy of Polygraph in the Law Enforcement Environment* (1983), printed in 23 *Polygraph* 260 (1994); D. Raskin et al., *Validity of Control Question Polygraph Tests in Criminal Investigation*, 25 *Psychophysiology* 474 (1988); J. Widacki, *Analiza Przeszanek Diagnozowania W. Badanich Poligraficznych (The Analysis of Diagnostic Premises in Polygraph Examinations)*, Uniwersytetu Slaskiego, Katowice (text in Polish) (1987); R. Putnam, *Field Accuracy of Polygraph in the Law Evaluation of Detection of Deception in a Riot Case Involving Arson and Murder*, 9 *Polygraph* 170 (1980).

TABLE 1

Validity of Examiners' Decisions  
(inconclusives excluded)

Authors/Dates	#	/	Total # Correct	/	%
Arellano (1990)	40		40		100%
Edwards (1981)	959		943		98%
Elaad/Schahar (1985)	174		168		97%
Matte/Reuss (1989)	114		114		100%
Murray (1989)	171		168		98%
Patrick/Iacono (1987)	81		78		96%
Putnam (1983)	285		281		99%
Raskin et al. (1988)	85		81		95%
Widacki (1982)*	38		35		92%
Yamamura/Miyake (1980)	95		85		89%
TOTALS	2042		1993		98%

\*Only the totals reported.

Ansley, *The Validity and Reliability*, at 171.

In a review of four CQ field studies, determined by the authors to meet the criteria for meaningful field studies, the average accuracy of field decisions for the CQ was 90.5%.<sup>17</sup> D. Raskin et al.; *Polygraph Tests: The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests*, § 14-2.2.1 at 575, in 1 *Modern Scientific Evidence: The Law and Science of Expert Testimony* (D. Faigman et al. eds., 1997) [hereinafter Raskin et al.,

<sup>17</sup> Those field studies were cited by Raskin et al. as follows: C. Honts, *Canadian Police Research Centre Field Validity Study of the Canadian Police College Polygraph Technique* (1994); C. Honts & D. Raskin, *A Field Study of the Validity of the Directed Lie Control Question*, 16 *J. Police Sci. & Admin.* 56 (1988); C. Patrick & W. Iacono, *Validity of the Control Question Polygraph Test: The Problem of Sampling Bias*, 76 *J. Applied Psychol.* 229 (1991); Raskin et al., *A Study of the Validity of Polygraph Examinations in Criminal Investigations*, National Institute of Justice (1988). Raskin et al., *Polygraph Tests: The Scientific Status*, at 575 n.38.



*Polygraph Tests: The Scientific Status*]. The accuracy rose to 95.5% when one study, for which the authors had some criticism, was excluded. *Id.*

Reviewing eleven analog studies, S. Abrams, *The Complete Polygraph Handbook* 190-191 (1989), found that, excluding inconclusives, overall accuracy of the CQ was "in the range of 87 percent."<sup>18</sup> The author observed that "[t]he findings for the CQT in the laboratory, for all of its weaknesses, indicate both high validity and reliability." *Id.* at 191.

<sup>18</sup> Those studies were cited by Abrams as follows: D. Raskin & R. Hare, *Psychopathy and Detection of Deception in Prison Population*, 15 *Psychophysiology* 126 (1978); D. Hammond, *The Responding of Normals, Alcoholics, and Psychopaths in a Laboratory Lie-Detection Experiment*, California School of Professional Psychology (1980) (unpublished doctoral dissertation); J. Widacki & F. Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 *J. Forensic Sci.* 596 (1978); L. Rovner et al., *Effects of Information and Practice on Detection of Deception*, paper presented at Society for Psychophysiological Research (Madison, Wisconsin, 1979), printed in 16 *Psychophysiology* 197 (1979); C. Honts & R. Hodes, *The Effects of Simple Physical Countermeasures on the Physiological Detection of Deception*, 19 *Psychophysiology* 564 (1982) (abstract); C. Honts & R. Hodes, *The Effects of Multiple Physical Countermeasures on the Detection of Deception*, 19 *Psychophysiology* 564 (1982) (abstract); R. Gatchel et al., *The Effect of Propranolol on Polygraphic Detection of Deception*, University of Texas Health Sciences Center (1983) (unpublished manuscript); G. Barland & D. Raskin, *An Evaluation of Field Techniques in Detection of Deception*, 12 *Psychophysiology* 321 (1975); J. Podlesny & D. Raskin, *Effectiveness of Techniques and Physiological Measures in the Detection of Deception*, 15 *Psychophysiology* 344 (1978); J. Kircher & D. Raskin, *Computerized Decision-Making in Physiological Detection of Deception*, 18 *Psychophysiology* 204 (1981); G. Barland, *A Validation and Reliability Study of Counterintelligence Screening Test*, Security Support Battalion, 902d Military Intelligence Group, Fort George G. Meade, Maryland (1981). S. Abrams, *The Complete Polygraph Handbook* 246-249 (1989).

Raskin et al., *Polygraph Tests: The Scientific Status*, reviewed eight "high quality" analog studies of the CQ which had been reported between 1978 and 1994.<sup>19</sup> The average accuracy of these CQ analog studies correctly classified approximately 90% of the subjects. *Id.* at § 14-2.2.1 at 572.

Petitioner argues that "a highly motivated subject . . . may employ countermeasures to obscure an accurate reading of physiological responses." Petitioner's Brief at 24-25. Amicus is aware of those studies which indicate some decreased accuracy of the polygraph when subjects are trained to employ countermeasures. See, e.g., C. Honts, *Interpreting Research on Countermeasures and the Physiological Detection of Deception*, 15 *J. Police Sci. & Admin.* 204 (1987). Although movement by the subject has been considered to be a possible countermeasure, use of an activity monitor placed beneath the subject's chair has been found to successfully detect these movements. S. Abrams & M. Davidson, *Counter-Counter-*

<sup>19</sup> Those analog studies were cited by Raskin et al. as follows: A. Ginton et al., *A Method for Evaluating the Use of the Polygraph in a Real-Life Situation*, 67 *J. Applied Psychol.* 131 (1982); C. Honts et al., *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 *J. Applied Psychol.* 252 (1994); S. Horowitz et al., *The Directed Lie: Standardizing Control Questions in the Physiological Detection of Deception* (in press, *Psychophysiology*); J. Kircher & D. Raskin, *Human Versus Computerized Evaluations of Polygraph Data in a Laboratory Setting*, 73 *J. Applied Psychol.* 291 (1988); J. Podlesny & D. Raskin, *Effectiveness of Techniques and Physiological Measures in the Detection of Deception*, 15 *Psychophysiology* 344 (1978); J. Podlesny & C. Truslow, *Validity of an Expanded-Issue (Modified General Question) Polygraph Technique in a Simulated Distributed-Crime-Roles Context*, 78 *J. Applied Psychol.* 788 (1993); D. Raskin & R. Hare, *Psychopathy and Detection of Deception in a Prison Population*, 15 *Psychophysiology* 126 (1978); L. Rovner et al., *Effects of Information and Practice on Detection of Deception*, 16 *Psychophysiology* 197 (1979). Raskin et al., *Polygraph Tests: The Scientific Status* § 14-2.2.1 at 572 n.33.

measures in *Polygraph Testing*, 17 *Polygraph* 16 (1988). Computerized analysis of the polygraph also offers a means of significantly reducing the effectiveness of countermeasures. Raskin et al., *Polygraph Tests: The Scientific Status*, § 14-2.2.1 at 577-78.

It is important to note that subjects who are only given information on countermeasures and who are not actually trained in their use have been shown to be unable to significantly affect the accuracy of the polygraph. *Id.*; L. Rovner, *The Accuracy of Physiological Detection of Deception for Subjects with Prior Knowledge*, 15 *Polygraph* 1 (1986). Moreover, the ability to consciously affect the outcome of a test is not unique to polygraph.<sup>20</sup> Use of countermeasure safeguards is an appropriate subject of inquiry by the trial court in performing its gatekeeping function under *Daubert* and as a legitimate subject of cross-examination during the adversarial process.

Many other criticisms of polygraph accuracy have been rebutted by empirical data. See J. Buckley & L. Senese, *The Influence of Race and Gender on Blind Polygraph Chart Analyses*, 20 *Polygraph* 247 (1991) (no significant difference in polygraph accuracy due to subjects' race or gender); D. Raskin & R. Hare, *Psychopathy and Detection of Deception in a Prison Population*, 15 *Psychophysiology* 126 (1978) (no significant difference in polygraph accuracy between psychopaths and non-psychopaths); but see M. Floch, *Limitations of the Lie Detector*, 40 *J. Crim. Law & Criminology* 651 (1950); S. Abrams, *The Validity of the Polygraph Technique with Children*, 3 *J. Police Sci. & Admin.* 310 (1975) (children over the

<sup>20</sup> See, e.g., *Rock*, 483 U.S. at 61 (recognizing that, notwithstanding procedural safeguards, the "motivations" of a subject of hypnotically-refreshed testimony may not be controlled); L. Binder & J. Parkratz, *Neuropsychological Evidence of a Fabricated Memory Complaint*, 9 *J. Clinical & Experimental Neuropsychology* 167, 167 (1987) ("performance on neuropsychological tests is strongly affected by the motivation of the patient").

age of eleven have high polygraph accuracy with accuracy rates dropping at lower ages); D. Raskin (Ed), *Psychological Methods in Criminal Investigation and Evidence* 253 (1989) (drugs have minimal effect on polygraph outcome); but see W. Waid et al., *Meprobamate Reduces Accuracy of Physiological Detection of Deception*, 212 *Science* 71 (1981).

At least one study indicates that polygraph evidence is more reliable than other evidence traditionally admitted at trial. J. Widacki & F. Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 *J. Forensic Sci.* 596 (1978). There, eighty volunteer subjects were divided into twenty groups of four. In each group, one was assigned to pick up a parcel from one of two doorkeepers of a building. Each of the twenty subjects brought an information sheet and envelope and left them with the doormen. Each subject signed a form in order to receive the package. The doormen knew in advance that participants would be coming. All eighty subjects were fingerprinted and provided handwriting samples. The doormen were each presented a set of four pictures and were required to select the person from each group who had picked up the package. A handwriting expert sought to identify the handwriting of the perpetrator from each group. A fingerprint expert sought to identify the perpetrator by lifting fingerprints from the envelopes and forms left with the doormen. A polygraphist examined each set of four subjects and made a decision as to who was the perpetrator.

Widacki & Horvath found that, excluding inconclusives, the fingerprint expert was correct in 100% of his decisions, the polygrapher was correct in 95% of his decisions, the handwriting expert was correct in 94% of his decisions, and the eyewitness was correct in 64% of his decisions. Interestingly, when inconclusives were included, the percentage of correctly resolved cases changed to 90%



polygraph, 85% handwriting, 35% eyewitness, and 20% fingerprint.

### C. Education and Training of Polygraph Examiners

Considerable emphasis has been made on improving the education and training of polygraph examiners. Initially, using the Air Force polygraph training program as a model,<sup>21</sup> DoDPI now offers an academic curriculum for federal examiners that

provides a basis for a thorough understanding of the scientific psychological, physiological, and psychophysiological concepts, systems, processes, and applications involved; as well as the scientific bases for test development, standardized test administration, research methodology, statistics and ethics.

Yankee, *The Current Status*, at 63. In addition to completing the DoDPI training, candidates for DoD polygraph examiners must be "a graduate of an accredited four-year college or have equivalent experience that demonstrates the ability to master graduate-level academic courses," have two years law enforcement investigative experience, be of high moral character as confirmed by background investigation, and complete a minimum of six months on-the-job internship. U.S. Department of Defense Polygraph Program: Annual Polygraph Report to Congress for Fiscal Year 1996, at 14. Currently, all federal agencies receive their basic polygraph training at DoDPI. *Id.* Further, all federal examiners are required to complete eighty hours of continuing education every two years. *Id.* at 15.

Numerous states now provide for licensing of polygraphers. See Giannelli & Imwinkelried, *Scientific Evi-*

<sup>21</sup> U.S. Department of Defense Polygraph Program: Report to Congress for Fiscal Year 1986, reprinted in 16 Polygraph 53, 63 (1986) (The "Air Force program has served as a model for our expansion and the characteristics which made it worthy of emulation are now standard throughout DoD.")

dence 2d at 219. Some of these states require continuing education for examiners. *Id.* At least one state, New Mexico, has adopted a rule of evidence requiring stringent minimum qualifications for polygraphers who testify as experts. See N.M. Stat. Ann. § 11-707(B) (requiring a minimum of five years experience in administration and interpretation of polygraph test and successful completion of twenty or more hours of continuing education in the field of polygraphy during the twelve-month period immediately prior to the date of subject examination).

Polygraphers who are full members of the APA must have graduated from an APA-accredited polygraph school,<sup>22</sup> completed no less than 200 actual PV examinations in a standardized polygraph technique, hold a current valid license to practice forensic psychophysiology issued by any state or federal agency requiring such license and receive a bachelor's degree from a college or university accredited by a regional accreditation board. See Matte, *Forensic Psychophysiology*, at 569-70. The APA maintains standards of practice and ethics for its members, *id.*, and conducts various regional and national seminars on polygraphy for its members. Giannelli & Imwinkelried, *Scientific Evidence* 2d, at 219.<sup>23</sup>

<sup>22</sup> The APA has, for some time, administered an accreditation program for polygraph schools. Giannelli & Imwinkelried, *Scientific Evidence* 2d, at 218. See also American Polygraph Association Manual for Polygraph School Accreditation (1997) (on file with the APA).

<sup>23</sup> Petitioner acknowledges that the APA and the American Association of Police Polygraphists (AAPP) publish standards for administering polygraphs and observes that many polygraph examiners do not belong to either the APA or AAPP. Petitioner's Brief at 23-24. Amicus initially observes that the polygraph examiner here was a federal examiner and, given the stringent requirements of DoDPI, federal examiners are not subject to this criticism. As to non-federal examiners, Amicus acknowledges that many examiners do not belong to either the APA or AAPP and are not graduates of an accredited polygraph school. However, due



#### IV. THE ADMISSION OF POLYGRAPH EVIDENCE DOES NOT OVERWHELM OR IMPERMISSIBLY INTRUDE ON FUNCTIONS PERFORMED BY THE TRIER OF FACT

Petitioner argues that "[e]ven assuming that polygraph testing had a high degree of reliability," such evidence may potentially encroach upon the proper functioning of the trier of fact as "juries may be unduly swayed by the polygraph expert's opinion" and "such evidence would nonetheless tend to infringe on the jury's role of determining witness credibility." Petitioner's Brief at 26-27. Although stated by petitioner as distinct arguments, both rely on the premise that the trier of fact will be so overwhelmed by polygraph evidence that it will relinquish its role to the polygraph expert. The weight of judicial and scientific authority does not support this premise.

In *United States v. Piccinonna*, the Eleventh Circuit observed that there is "a lack of evidence that juries are unduly swayed by polygraph evidence." 885 F.2d at 1535. In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), the Court of Military Appeals, expressing its "confidence in court-martial panels," noted:

One fear we do not have is that fact finders will be overwhelmed by polygraph testimony. . . . A number of recent studies refute that contention, and their authors conclude that juries generally are capable of evaluating polygraph evidence and giving it due weight.

to legislation and other changes in the field, "a large portion of the least competent" examiners have left the field. See Raskin et al., *Polygraph Tests: The Scientific Status*, § 14-2.3 at 582. This has had "a salutary effect on the level of competence and practice in the field." *Id.* The fact that there may be unqualified polygraphers does not require wholesale exclusion of the science from the courtroom. Rather, the court may perform its traditional "gatekeeping" role by assessing whether a particular expert witness is sufficiently qualified to offer opinion testimony based on that science and the state may impose reasonable licensing standards for polygraphers.

24 M.J. at 253 n.11 (citing E. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective Of Juror Psychology*, 100 Mil. L. Rev. 99, 114-15 (1983)). See also *United States v. Piccinonna*, 885 F.2d at 1533. Indeed, scientific evidence has become part of the modern trial and, as such, jurors are not likely to be overly influenced by such evidence. See *Daubert*, 509 U.S. at 595 (arguments for excluding evidence based on fears of "befuddled juries . . . confounded by absurd and irrational pseudoscientific assertions . . . [are] overly pessimistic about the capabilities of the jury, and of the adversary system generally").

Scientific literature supports the conclusion that jurors are not unduly influenced by polygraph evidence.<sup>24</sup> Commentators generally agree with this assessment. See, e.g., C. Honts & M. Perry, *Polygraph Admissibility: Changes and Challenges*, 16 Law & Hum. Behav. 357, 366 (1992) ("[s]tudies tend to show that juries are more inclined not to give extraordinary weight to polygraph evidence"); McCall, *Misconceptions and Reevaluation*, at 376 ("[t]he continued use of the undue deference rationale for the denial position also demeans the ability of modern juries").

Polygraph evidence is, of course, not the only type of evidence which may be offered regarding indicators of witness credibility. In *United States v. Cacy*, 43 M.J. 214, 218 (1995), the court observed that it is usually permissible to allow an expert to testify as to whether "a victim appears rehearsed or coached, or is feigning." Testimony has also been permitted regarding whether "counter-intuitive conduct, such as recanting an accusation, inconsistent statements, or failing to report abuse is

<sup>24</sup> See E. Carlson et al., *The Effect of Lie Detector Evidence on Jury Deliberations: An Empirical Study*, 5 J. Pol. Sci. & Admin. 148 (1977); A. Markwart & B. Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*, 7 J. Pol. Sci. & Admin. 324 (1979); R. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 A.B.A. J. 162, 165 (1982).

not necessarily inconsistent with the truthful accusation." *United States v. Scheffer*, at 446.

Psychiatrists and other clinicians have been permitted to provide expert opinion testimony as to whether a party is malingering or accurately representing his competency, injury, or disability. See, e.g., *United States v. Denny-Shaffer*, 2 F.3d 999, 1023 n.8 (10th Cir. 1993). While such opinions may be based on clinical impressions alone,<sup>25</sup> *Liles v. Saffle*, 945 F.2d 333 (10th Cir. 1991), such testimony may also be based on certain psychological tests; in particular, internal validity scales of the Minnesota Multiphasic Personality Inventories (MMPI). See, e.g., *United States ex rel. S.E.C. v. Billingsley*, 766 F.2d 1015, 1026 (7th Cir. 1985) (in which experts describe the MMPI as "a test that has numerous scales, designed to elicit malingering or an attempt to . . . lie"). As set forth by Faust et al., the use of such internal validity scales of the MMPI are supported by a "body of validating research" which supports detection of malingering. 1 D. Faust et al., *Brain Damage Claims: Coping with Neuropsychological Evidence* 429 (1991). That research demonstrates a validity rate comparable to polygraphs.<sup>26</sup>

Polygraph evidence, on the same basis as that evidence discussed above, is not intended to take from the trier of fact issues of guilt, innocence, or credibility. Rather, polygraph evidence, like other relevant scientific evidence, is intended to provide in appropriate cases evidence of

<sup>25</sup> See 1 D. Faust et al., *Brain Damage Claims: Coping with Neuropsychological Evidence* 429 (1991) ("[t]here appears to be a paucity of research which suggests that clinicians have the ability to detect malingering").

<sup>26</sup> Research has demonstrated the F minus K index as a reasonably accurate discriminator. H. Gough, *The F Minus K Dissimulation Index for the MMPI*, 14 J. Consulting Psych. 408 (1950) (depending on the cut-off applied, correctly identified authentic profiles between 88% to 97.5% of time while correspondingly mis-identifying simulated profiles 12% to 28% of the time).

whether a witness's physiological responses to certain relevant questions are or are not indicative of deception. Like other relevant scientific evidence, polygraph evidence is simply intended to be a part of the evidence to be assessed through the adversarial process.

#### V. THE ADMISSION OF POLYGRAPH EVIDENCE DOES NOT CREATE UNNECESSARY COLLATERAL LITIGATION

Both petitioner and Amici Curiae State of Connecticut and 27 States [hereinafter Amici States] speculate that attempts to admit results of polygraph examinations will produce lengthy collateral litigation<sup>27</sup> in the form of evidentiary hearings regarding "the validity of the test, the testing procedures utilized, the qualifications of the examiner, the conditions under which the test was administered, and the content of the questions asked." Amici States Brief at 15-16. See also Petitioner's Brief at 29.

In addressing this argument, the court in *United States v. Scheffer* observed that it was "unaware of any such flood of polygraph cases" after its decision in *United States v. Gipson* and further observed that "our measure should be the scales of justice, not the cash register." 44 M.J. at 448. Additionally, petitioner and Amici States' fear of lengthy collateral litigation ignores the states' prerogative to reduce the uncertainties of admission of polygraph evidence by establishing reasonable parameters and guidelines for its admission at trial. As observed by this Court in *Rock*, a state "would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony." *Rock* at 61. Reasonable guidelines could also be appropriately implemented as to polygraph evidence. An example of such guidelines is

<sup>27</sup> Amici States observe that a number of states currently follow a *per se* exclusion of polygraph evidence. Similarly, in *Rock*, a number of states maintained a *per se* exclusion of hypnotically-refreshed testimony. *Rock* at 47 n.14.

found in New Mexico's rules of evidence. N.M. Stat. Ann. § 11-707;<sup>28</sup> see also McCall, *Misconceptions and Re-evaluation*, at 385-388.

Further, trial courts routinely consider expert qualifications, testing procedure, validity, and application of many types of scientific evidence. Polygraph evidence should be considered by the trial courts on the same basis.

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted,

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<sup>28</sup> In addition to providing minimum qualifications a polygrapher must meet to give testimony of polygraph results, the New Mexico statute requires, in part: protocol requirements for the examination; recording of the pre-test interview, actual testing, and post-test interview; copies of the recording along with the charts, report, and a list of all polygraph examinations taken by the examinee to the opposing party; and thirty days' notice of intent to offer polygraph evidence at trial.



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No. 96-1133

Supreme Court, U.S.

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*In the Supreme Court of the United States*

October Term 1996

UNITED STATE OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER, RESPONDENT

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

**BRIEF OF THE COMMITTEE OF CONCERNED  
SOCIAL SCIENTISTS AS *AMICUS CURIAE*  
IN SUPPORT OF THE RESPONDENT**

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HIPP

### QUESTION PRESENTED

Whether Military Rule of Evidence 707, Which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

(I)

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No. 96-1133

**In the Supreme Court of the United States**

October Term 1996

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UNITED STATE OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER, RESPONDENT

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

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**BRIEF OF THE COMMITTEE OF CONCERNED  
SOCIAL SCIENTISTS AS *AMICUS CURIAE*  
IN SUPPORT OF THE RESPONDENT**

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**INTEREST OF THE *AMICUS CURIAE***

The Committee of Concerned Social Scientists is a group of learned professionals involved in scientific research, professional training, and/or practice involving the psychophysiological detection of deception. Members of the committee believe that the state of the science of polygraphy has advanced to the point that properly administered poly-

graph tests have comparable or better reliability than the other products of psychological science that presently are admitted as evidence in courts of law.

As the polygraph is a reliable, valid, and accepted scientific technique, the members of the Committee support the Respondent in seeking to sustain the judgment of the Court of Appeals. As required by Rule 37, the Committee of Concerned Social Scientists has sought and obtained consent of both parties prior to filing this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Gipson*, 24 M.J. 246 (1987) the Court of Military Appeals (now the Court of Appeals for the Armed Forces) concluded that polygraph tests had reached a level of scientific reliability such that they should not be routinely excluded from court-martial proceedings. Under *Gipson*, the Military Judge was given the role of gatekeeper and was provided with a set of evidentiary standards to use in the analysis of the admissibility of any offered polygraph examinations. Subsequently, the President of the United States responded to *Gipson* by promulgating Military Rule of Evidence 707 which provided for a total prohibition of the use of polygraph results in any court-martial proceeding. Respondent attempted to offer the results of an exculpatory polygraph in his defense at court martial. The military judge denied the request and noted that "the polygraph is not a process that has sufficient scientific acceptability to be relevant". The Air Force Court of Criminal Appeals rejected respondent's appeal noting that there are "valid concerns" about polygraph examinations. The United States Court of Appeals for the Armed Forces reversed. Petitioner has appealed to the United States Supreme Court. Petitioner makes a number of legal arguments but also raises a number

points that have to do with the science of polygraph testing. Petitioner asserts that the reliability and helpfulness of polygraph tests are widely questioned by the scientific community and that polygraph tests lack broad acceptance within the scientific community. Petitioner also argues that polygraph tests are not necessary for reliable credibility assessments of witnesses at trial.

An examination of the scientific literature on the credibility assessment in general, and on the polygraph in particular reveals a very different situation than the one asserted by the petitioner. Research reveals that polygraph tests are generally accepted in the scientific community as evidenced by the volume of publications in peer-reviewed scientific journals and by surveys of scientists. Moreover, the scientific literature clearly shows that the science of polygraph testing has advanced to the point where it can easily meet the evidentiary requirements of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). There is a scientific theory that has been tested with the methods of science. The results of those scientific tests have been published in peer-reviewed scientific journals. There are known estimates of the error-rates of the commonly used field polygraph techniques. The polygraph is generally accepted by a majority of the informed scientific community as a valid scientific technique. There are standards for the administration of polygraph tests.

The primary problem with the widespread use of polygraph tests concerns the generally low level of training among the members of the polygraph profession. However, polygraph examiners in the United States Military are generally recognized as some of the best trained examiners in the world. Moreover, the United States Military polygraph programs maintain a high level of quality control over the administration of polygraph examinations. These factors work to ensure that the quality of polygraph practice in the



United States Military is quite high. In any event, the problems associated with poor training or incompetent examiners can easily be remedied by evidentiary requirements such as those promulgated in *Gipson* and in New Mexico Rule of Evidence 707 and through the traditional means of cross-examination.

For these reasons the undersigned Committee of Concerned Social Scientists urges the Court to affirm the decision of the United States Court of Appeals for the Armed Forces and return the status of polygraph in court-martial proceeding to the status originally established by *Gipson*. Under *Gipson* the trial court rules on a case-by-case approach assuring that incompetently conducted tests will not be admitted as evidence, while ensuring the defendant's right to present scientifically valid evidence in his or her defense.

## ARGUMENT

### I. WHAT IS A POLYGRAPH TEST?

Polygraph testing involves measuring physiological responses from an individual while that individual answers a series of from 8 to 12 questions. Those questions are reviewed with the subject of the test, prior to the beginning of the test<sup>1</sup>.

<sup>1</sup> Details of the instrumentation used, the various physiological measures that can be taken, and the specific questioning techniques employed, can be found in John A. Podlesny & David C. Raskin, *Effectiveness of Techniques and Physiological Measures in the Detection of Deception*, 15 *PSYCHOPHYSIOLOGY*, 344 (1978); David C. Raskin, *Polygraph Techniques for the Detection of Deception*, in David C. Raskin (Ed.) *PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE*, 276 (1989) at 264; David C. Raskin, Charles R. Honts, and John C. Kircher, *The Scientific Status of Research on Polygraph Techniques: The Case For Polygraph Tests*, in *MODERN SCIENTIFIC*

In practice, virtually all polygraph instruments used for psychophysiological credibility assessment record measures from at least three physiological systems that are controlled by the autonomic nervous system. Recordings are usually made of palmar sweating (also known as the galvanic skin or electrodermal response), relative blood pressure (obtained from an inflated cuff on the upper arm), and respiration (obtained from volumetric sensors placed around the chest and/or abdomen). Many instruments will also provide a measure of peripheral blood flow (usually obtained from a photoelectric plethysmograph placed on one of the fingers).

Following the conclusion of the questioning, the physiological data are evaluated by the polygraph examiner according to specified numerical scoring system. In some cases the data are evaluated statistically by computer. A decision of truthful or deceptive is then given, except in those cases where the data are found to be equivocal, then an opinion of inconclusive is rendered.<sup>2</sup>

### II. THE THEORETICAL BASIS FOR POLYGRAPH TESTING

Polygraphy, also known as the psychophysiological detection of deception and psychophysiological credibility assessment, is based upon a scientific theory that can be tested with the methods of science (falsified). Any conscious effort at deception by a rational individual causes involuntary

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EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, D. L. Faigman, D. Kaye, M. J. Saks, & J. Sanders (Eds. 1997).

<sup>2</sup> A description of the numerical and computer scoring procedures can be found in John C. Kircher and David C. Raskin, *Human Versus Computerized Evaluations of Polygraph Data in a Laboratory Setting*, 73 *J. APPLIED PSYCHOL.* 291 (1988).

and uncontrollable physiological responses which include measurable reactions in blood pressure, peripheral pulse-amplitude, breathing and the electrodermal response.

The various techniques used in polygraphy for the detection of deception are also capable of being tested through the methods of science. The most commonly used techniques for the psychophysiological detection of deception are comparison question tests (CQT)<sup>3</sup>. The theory of these comparison question tests is as follows: The CQT assesses a person's credibility by looking for a differential reaction between two types of questions. The first type of question is known as the relevant question. Relevant questions are direct accusatory questions that address the issue under investigation (e.g., Did you shoot John Doe?) Comparison questions are ambiguous questions to which the subject is maneuvered into answering, "No" (e.g., Before 1994, did you ever do anything that was dishonest?). The theory of the comparison question test predicts that guilty subjects will produce larger physiological responses to the relevant questions to which they know they are deceptive, than to the relatively unimportant comparison questions. Innocent subjects are expected to produce larger responses to the comparison questions, to which they are assumed to be either deceptive, or at least uncertain of the veracity of their answer, than to the truthfully answered relevant questions. This type of comparison question is known as a probable lie comparison question and is the most commonly used comparison question in the field. Other types of comparison questions are also used. The second most commonly applied comparison question is the "directed lie" question. The directed lie is a question to which the subject is instructed to lie. The subject is told that

<sup>3</sup> Supra note 1 (Raskin); Charles R. Honts & Bruce D. Quick, The polygraph in 1995: Progress in science and law, NORTH DAKOTA LAW REVIEW, 71 (1995).

it is important that he or she respond appropriately when she or he lies. The predicted differential reactions and rationale of the directed lie are the same as for the probable lie.

### **III. THE THEORIES UNDERLYING POLYGRAPH TECHNIQUES HAVE BEEN SUBJECTED TO SCIENTIFIC TESTING. THOSE SCIENTIFIC TESTS HAVE RESULTED IN NUMEROUS PUBLICATIONS IN PEER-REVIEWED SCIENTIFIC JOURNALS**

The basic theory of the psychophysiological detection of deception and the various techniques used for the detection of deception have been put to numerous scientific tests over the past 25 years. There are many studies published in peer-reviewed scientific journals that test the theory of the psychophysiological detection of deception and provide estimates of the error rates for comparison question tests. Science has approached the problem of assessing the accuracy of comparison question tests in two venues, laboratory studies and field studies.

Laboratory research has traditionally been an attractive alternative because the scientist can control the environment. Moreover, with regard to credibility assessment studies, the scientist can know with certainty who is telling the truth and who is lying by randomly assigning subjects to conditions. Laboratory research on credibility assessment has typically made subjects deceivers by having them commit a mock crime (e.g., "steal" a watch from an office), and then instructing them to lie about it during a subsequent test. From a scientific viewpoint, random assignment to conditions is highly desirable because it controls for the influence of extraneous variables that might confound the results of the

experiment.<sup>4</sup> However, laboratory research in general, and credibility assessment in particular, can be criticized for a lack of realism. This lack of realism may limit the ability of the scientist to apply the results of the laboratory to real-world settings.<sup>5</sup> Some scientists who conduct research on psychophysiological credibility assessment have attempted to overcome this limitation by trying to make the laboratory simulations as realistic as possible.<sup>6</sup> The goal of making laboratory simulations as realistic as possible would seem to be reasonable and should provide results that have at least some applicability to field situations.

A review of the scientific literature reveals nine laboratory studies of the CQT that have attempted to simulate the field situation with specific incentives associated with the

<sup>4</sup> See the extensive discussion of the advantages of random assignment to conditions in T. D. Cook and D. T. Campbell, *QUASI-EXPERIMENTATION: DESIGN AND ANALYSIS ISSUES FOR FIELD SETTINGS* (1979).

<sup>5</sup> *Id.*

<sup>6</sup> See John C. Kircher, Steven W. Horowitz, & David C. Raskin, Meta-analysis of mock crime studies of the control question polygraph technique, 12, *LAW AND HUMAN BEHAVIOR*, 79 (1988). Three factors have been identified as contributing to the realism of laboratory research on the CQT. 1) Use of realistic subject populations. College student subjects have been associated with low accuracy rates, while more representative subject samples from prison populations and the community have been associated with higher accuracy rates. 2) Use of representative field examiners, techniques, and scoring methods. Those laboratory studies that have used field polygraph examiners, and field techniques for administering and scoring the examinations have produced higher accuracy rates. 3) The use of incentives associated with the outcome of the examinations. Usually, subjects are paid money if they pass the examination, although other studies have used negative events associated with failing the test. Studies with explicit motivations associated with the outcome of the test have produced higher accuracy rates.

test outcome and with representative subject populations and polygraph methods.<sup>7</sup> The results of those realistic laboratory studies are illustrated in Table 1. The high quality laboratory studies indicate that the CQT is a very accurate discriminator of truth tellers and deceivers. Over all of the studies, the CQT correctly classified 91 percent<sup>8</sup> of the subjects and produced approximately equal numbers of false positive and false negative errors.

The alternative approach to studying psychophysiological credibility assessment is to conduct field studies. In this approach, polygraph tests conducted in actual cases are examined. Although field studies are plagued by numerous problems,<sup>9</sup> the chief problem lies in unambiguously determining ground truth. That is, some method that is independent of the outcome of the test is needed for determining who

<sup>7</sup> Lawrence N. Driscoll, et. al., The Validity of the Positive Control Physiological Detection of Deception Technique, 15 *J. POLICE SCI. ADMIN.* 46 (1987); Avital Ginton et. al., *A Method for Evaluating the Use of the Polygraph in a Real-Live Situations*, 67 *J. APPLIED PSYCHOL.* 131 (1982); Charles R. Honts et al., *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 *J. APPLIED PSYCHOL.* 252 (1994); Horowitz et al., 34 *The Role of Comparison Questions in Physiological Detection of Deception PSYCHOPHYSIOLOGY* 108 (1997); *Supra* note 2 (Kircher & Raskin); Podlesny & Raskin, *supra* note 1; John A. Podlesny & Connie M. Truslow, *Validity of an Expanded-Issue (Modified General Question) Polygraph Technique in a Simulated distributed-Crime-Roles Context*, 78 *J. APPLIED PSYCHOL.* 788 (1993); David C. Raskin & Robert D. Hare, *Psychopathy and Detection of Deception in a Prison Population*, 15 *PSYCHOPHYSIOLOGY*, 126 (1978); Louis I. Rovner, *The accuracy of physiological detection of deception for subjects with prior knowledge*, 15 *POLYGRAPH* 1 (1986).

<sup>8</sup> This figure excludes the inconclusive outcomes as they are not decisions.

<sup>9</sup> *Supra* Note 4 (Cook & Campbell).



Table 1. The Results of High Quality Laboratory Studies of the Control Question Test

Study	n	Guilty			n	Innocent		
		% Correct	% Wrong	% Inc		% Correct	% Wrong	% Inc
Drasoff et al. (1987) <sup>b</sup>	20	90	0	10	20	90	0	10
Gaston et al. (1984)	2	100	0	0	13	85	15	0
Honts, et al. (1994) <sup>a</sup>	20	70	20	10	20	75	10	15
Horowitz, et al. (1994) <sup>b</sup>	15	53	20	27	15	80	13	7
Kircher & Raskin (1988)	50	88	6	6	50	88	6	8
Podlesny & Raskin (1978)	20	70	15	15	20	90	5	5
Podlesny & Truslow (1993)	72	69	13	18	24	75	4	21
Raskin & Hare (1978)	24	88	0	12	24	88	8	4
Rovner et al. (1979) <sup>c</sup>	24	88	0	12	24	88	8	4
Means	247	80	8	12	210	84	8	8
Percent Decisions		90	10			92	8	

<sup>a</sup>Countermeasure Subjects Excluded<sup>b</sup>Traditional Control Question Subjects Only

is in fact telling the truth. Although a number of approaches have been taken, it is generally agreed that confessions are the best available criterion for ground truth in these studies.<sup>10</sup> It now seems to be generally agreed by persons doing field research in this area that useful field studies of the psychophysiological credibility assessment tests should have all of the following characteristics:<sup>11</sup>

(a) Subjects should be sampled from the actual population of subjects in which the researcher is interested. If the researcher wants to make inferences about tests conducted on criminal suspects, then criminal suspects should be the subjects who are studied.

(b) Subjects should be sampled by some random process. Cases must be accepted into the study without reference to either the accuracy of the original outcome or to the quality of the physiological recordings.

(c) The resulting physiological data must be evaluated by persons trained and experienced in the field scoring tech-

<sup>10</sup> The problems associated with field research in this area are discussed in detail in, *Supra* note 1 (Raskin).

<sup>11</sup> *Supra* note 1 (Raskin, Honts, & Kircher).

niques about which inferential statements are to be made. Independent evaluations by persons who have access to only the physiological data are useful for evaluating the information content of those data. However, the decisions rendered by the original examiners probably provide a better estimate of the accuracy of polygraph techniques as they are actually employed in the field.

(d) The credibility of the subject must be determined by information that is independent of the specific test. Confessions substantiated by physical evidence are presently the best criterion available.

In their recent review, Raskin and his colleagues<sup>12</sup> also examined the available field studies of the CQT. They were able to find four field studies<sup>13</sup> that met the above criteria for meaningful field studies of psychophysiological detection of deception tests. The results of the independent evaluations for those studies are illustrated in Table 2. Overall, the independent evaluations of the field studies produce results that are quite similar to the results of the high quality laboratory studies. The average accuracy of field decisions for the CQT was 90.5 percent.<sup>14</sup> However, with the field studies

<sup>12</sup> *Id.*

<sup>13</sup> Charles R. Honts, Criterion development and validity of the control question test in field application, *THE JOURNAL OF GENERAL PSYCHOLOGY*, 509, 123 (1996); Charles R. Honts & David C. Raskin, A Field Study of the Directed Lie Control Question, 16 *J. POLICE SCI. ADMIN.* 56 (1988); Christopher J. Patrick & William G. Iacono, Validity of the Control Question Polygraph Test: The Problem of Sampling Bias, 76, *J. APPLIED PSYCHOL.* 229 (1991); David C. Raskin et. al., A STUDY OF THE VALIDITY OF POLYGRAPH EXAMINATIONS IN CRIMINAL INVESTIGATIONS, Final Report to the National Institute of Justice, Grant Number 85-IJ-CX-0400, Department of Psychology, Salt Lake City, University of Utah. (1988).

<sup>14</sup> The results exclude inconclusive outcomes as they are not decisions.

nearly all of the errors made by the CQT were false positive errors.<sup>15</sup>

Table 2. The Accuracy of Independent Evaluations in High Quality Field Studies

Study	n	Guilty			n	Innocent		
		% Correct	% Wrong	% Inc		% Correct	% Wrong	% Inc
Control Question Tests								
Honts (1996)a	7	100	0	0	6	83	0	17
Honts & Raskin (1988)b	12	92	0	8	13	62	15	23
Patrick & Iacono (1991)c	52	92	2	6	37	30	24	46
Raskin et al. (1989)d	37	73	0	27	26	61	8	31
Means	108	89	1	10	82	59	12	29
Percent Decisions		98	2			75	25	

<sup>a</sup>Sub-group of subjects confirmed by confession and evidence.

<sup>b</sup>Decision based only on comparisons to traditional control questions.

<sup>c</sup>Results from the mean blind rescoring of the cases "verified with maximum certainty" (p.235)

<sup>d</sup>These results are from an independent evaluation of the "pure verification" cases.

Although the high quality field studies indicate a high accuracy rate for the CQT, all of the data represented in Table 2 were derived from independent evaluations of the physiological data. This is a desirable practice from a scientific viewpoint, because it eliminates possible contamination (e.g. knowledge of the case facts; and the overt behaviors of the subject during the examination) in the

<sup>15</sup> See the discussion in Raskin et. al., *supra* note 1, and in Honts, *supra* note 13, concerning the performance of original examiners in these studies. They note that the original examiners in the Patrick and Iacono study perform at a much higher level than the independent evaluators. This finding was not representative of the other three field studies. The original examiners in the Patrick and Iacono study, *supra* note 13, correctly classified 100% of the guilty and 90% of the innocent subjects. This performance is quite similar to the original examiners in the Honts (1996) field study, *supra* note 11, who were from the same law enforcement agency. Raskin et. al., *supra* note 1, and Honts, *supra* note 13, have argued that the independent evaluator data from the Patrick and Iacono study should be viewed as an anomaly. If the Patrick and Iacono data are excluded, the field estimate of the accuracy of CQT decisions is 95.5%, Raskin et. al., *Supra* Note 1.

decisions of the original examiners. However, independent evaluators rarely offer testimony in legal proceedings. It is usually the original examiner who gives testimony. Thus, accuracy rates based on the decisions of independent evaluators may not be the true figure of merit for legal proceedings. Raskin and his colleagues have summarized the data from the original examiners in the studies reported in Table 2, and for two additional studies that are often cited by critics of the CQT.<sup>16</sup> The data for the original examiners are

<sup>16</sup> Those two studies are, Benjamin Kleinmuntz and Julian J. Szucko, A field study of the fallibility of polygraphic lie detection, 308, *NATURE*, 449 (1984), Frank Horvath, The effects of selected variables on interpretation of polygraph records, 62, *JOURNAL OF APPLIED PSYCHOLOGY* 127 (1977). Neither of these studies meets the generally accepted requirements for useful field studies but nevertheless they are frequently cited by critics of the CQT as evidence that the CQT is not accurate. The study reported by Benjamin Kleinmuntz and Julian J. Szucko, A field study of the fallibility of polygraphic lie detection, 308, *NATURE*, 449 (1984) fails to meet the criteria for a useful field study because: The subjects were employees who were forced to take tests as part of their employment, not criminal suspects. The case selection method was not specified. The data were evaluated by students at a polygraph school that does not teach blind chart evaluation. Moreover, those students were given only one ninth of the usual amount of data collected in a polygraph examination and were forced to use a rating scale with which they were not familiar. The study reported by Frank Horvath, The effects of selected variables on interpretation of polygraph records, 62, *JOURNAL OF APPLIED PSYCHOLOGY* 127 (1977), also fails to meet the criteria for a useful study because: About half of the innocent subjects were victims of violent crime, not suspects. Virtually all of the false positive errors in that study were with innocent victims, not innocent suspects. In addition, the persons doing the blind evaluations were all trained at a polygraph school that does not teach blind chart evaluation. Finally, cases were not selected at random. Some cases were excluded from the study because of the nature of the charts. An interesting fact that critics almost never mentioned is that the decisions by the original examiners in the Horvath Study were 100% correct. Also see the discussion in David C. Raskin, *Methodological issues in estimating*

presented in Table 3. These data clearly indicate that the original examiners are even more accurate than the independent evaluators.

Table 3. Percent Correct Decisions by Original Examiners in Field Cases

Study	Innocent	Guilt
Horvath (1977)	100	100
Honts and Raskin (1988)	100	92
Kleinmuntz and Szucko (1984)	100	100
Raskin, Kircher, Honts, & Horowitz (1988) <sup>a</sup>	96	95
Patrick and Iacono (1991)	90	100
Honts (1996) <sup>b</sup>	100	94
<b>Means</b>	<b>98</b>	<b>97</b>

<sup>a</sup> Cases where all questions were confirmed.

<sup>b</sup> Includes all cases with some confirmation.

#### IV. SUMMARY OF THE SCIENTIFIC DATA ON THE VALIDITY OF THE COMPARISON QUESTION TESTS

The scientific data concerning the validity of the polygraph can be summarized as follows: High quality scientific research from the laboratory and the field converge on the conclusion that the CQT is a highly accurate discriminator of truth tellers and deceivers. The research results converge on an accuracy estimate that exceeds 90 percent. Moreover, original examiners, who are most likely to offer testimony, produce even higher estimates of accuracy. There may be a tendency for the CQT to produce more false positive than false negative errors, but this trend in the current literature is

polygraph accuracy in field applications, 19, CANADIAN JOURNAL OF BEHAVIOURAL SCIENCE 389 (1987).

not particularly strong.<sup>17</sup> Moreover, no tendency toward false positive errors is seen in the decisions of the original examiners. The scientific validity of a properly administered polygraph examination in a real life case compares favorably with such other forms of scientific evidence as x-ray films, electrocardiograms, fiber analysis, ballistics comparison tests, blood analysis, and is far more reliable than other forms of expert testimony (e.g., psychiatric and psychological opinions as to sanity, diminished capacity, dangerousness and many of the post traumatic stress/recovered memory syndromes).<sup>18</sup>

#### V. ALTHOUGH THE SUBJECT OF SOME CONTROVERSY, POLYGRAPH TESTS ARE ACCEPTED AS VALID SCIENCE WITHIN THE RELEVANT SCIENTIFIC COMMUNITY OF PSYCHOLOGISTS AND PSYCHOPHYSIOLOGISTS.

<sup>17</sup> This is especially true if the outlying data produced by the Patrick and Iacono study, supra note 13, are discounted.

<sup>18</sup> See the discussion by Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes and Challenges*, 16, L. & HUM. BEHAV. 357 (1992), and by Honts & Quick, Supra note 3; Also see J. L. Peterson, E. L. Fabricant, and K. S. Field, LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (Contract Nos. 74-NI-99-0048 and 76-NI-99-0091). U. S. Department of Justice, Washington, D.C. (1978), showing high error rates for traditional forensic analyses; J. Widacki & F. S. Horvath, 23 *An Experimental Investigation Of The Relative Validity And Utility Of The Polygraph Technique And Three Common Methods Of Criminal Identification*, JOURNAL OF THE FORENSIC SCIENCES, 596 (1978) describing an experiment showing a favorable comparison among the validity estimates for the polygraph, eyewitness identification and finger print analysis.



The notion that the polygraph is generally accepted in the relevant scientific community as a valid technique is supported by several sources of evidence. There have been two surveys of the Society for Psychophysiological Research that have directly attempted to address the general acceptance issue.<sup>19</sup> The Society for Psychophysiological Research is a professional society of scientists (Ph.D. and M.D.) who study how the mind and body interact. Thus, the Society for Psychophysiological Research would seem to be the appropriate scientific community for assessing general acceptance. An initial survey was undertaken by the Gallup Organization in 1982. That survey was replicated and extended in 1993 in Susan Amato's Master's Thesis at the University of North Dakota. The results of those surveys were very consistent. Roughly two thirds of the Ph.D. and M.D. members of the Society for Psychophysiological Research who were surveyed stated that they felt that polygraph tests were a valuable diagnostic tool when considered with other available information or that it was sufficiently reliable to be the sole determinant.<sup>20</sup> In the Amato study, when only those respon-

<sup>19</sup> The Gallup Organization, *Survey of the members of the Society for Psychophysiological Research concerning their opinions of polygraph test interpretations*, 13, POLYGRAPH, 153 (1984); Susan L. Amato, A SURVEY OF THE MEMBERS OF THE SOCIETY FOR PSYCHOPHYSIOLOGICAL RESEARCH REGARDING THE POLYGRAPH: OPINIONS AND IMPLICATIONS. Accepted Master's Thesis, the University of North Dakota, Grand Forks (1993); also as Susan L. Amato and Charles R. Honts 31 *What do psychophysiologicalists think about polygraph tests? A survey of the membership of SPR*, PSYCHOPHYSIOLOGY S22 (1994).

<sup>20</sup> Respondents in both surveys gave responses to the following question: Which one of these four statements best describes your own opinion of polygraph test interpretations by those who have received systematic training in the technique, when they are called upon to interpret whether a subject is or is not telling the truth? A) It is a sufficiently reliable method to be the sole determinant, B) It is a useful diagnostic tool when consid-

dents who reported they were highly informed about the polygraph literature are considered, the percentage who report that polygraph tests are a useful diagnostic tool rises to 83%. Of those individuals who rated themselves as highly informed, fewer than 10% report being involved in conducting polygraph examinations professionally. Therefore, these results are not suspect on the grounds that the responses were skewed by the financial self-interest of the respondents. These results would seem to indicate that there is a great deal of acceptance of these techniques in the relevant scientific community.<sup>21</sup>

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ered with other available information, C) It is questionable usefulness, entitled to little weight against other available information, D) It is of no usefulness.

<sup>21</sup> There has recently been a third survey of the members of the SPR. That survey was reported by William Iacono and David Lykken of the University of Minnesota, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, D. L. Faigman, D. Kaye, M. J. Saks, & J. Sanders (Eds. 1997). Drs. Iacono and Lykken are two of the most outspoken critics of polygraph testing. However, at present there are reasons to believe that the Iacono and Lykken survey is so flawed and at this time so controversial that it cannot be used for any substantive purpose. Problems with the Iacono and Lykken study include: 1) The cover letter for the Iacono and Lykken survey sets the survey in the context of the legal admissibility of the polygraph in court, rather than about the scientific acceptance and validity of the technique. In effect this is asking the respondents to make a political and legal judgment rather than a scientific one. Moreover, the CQT was set in the context of the O. J. Simpson case and subjects were told that countermeasures against the CQT were effective. This is in clear contrast the Amato survey (Supra note 19) which was set in the context of whether or not the Society for Psychophysiological Research should have a formal scientific policy regarding the validity of polygraph testing. The context of the Iacono and Lykken survey is clearly inappropriate since few, if any, of the members of the SPR have the legal background to make an admissibility assessment. 2) The sample of respondents to the Iacono and Lykken survey describe themselves as very uninformed about

the topic of polygraph examinations. When asked, "About how many empirical studies, literature reviews, commentaries, or presentations at scientific meetings dealing with the validity of the CQT have you read or attended?" the average respondent replied 2.6, with a standard deviation of 1.5. This means that 83% of the respondents had read or attended fewer than 4.1 papers or presentations on polygraph. Moreover, fewer than 2% of the respondents had read more than 5.6 articles. Given the large number of scientific articles and presentations on this topic (Dr. Charles Honts has either authored or co-authored over 100 such papers and presentations by himself, many of which were given at the Society for Psychophysiological Research meetings), these data provide a strong indication that the Iacono and Lykken sample was, as a whole, highly uninformed about the polygraph, and thus has little to offer in terms of informed opinion about its scientific validity. 3) There is one known anomaly in the Iacono and Lykken data analysis that makes it impossible to compare some of their results to the other surveys in any meaningful way. In determining their highly informed group, Iacono and Lykken cut the distribution at 4 and above on their 7-point scale. In forming their highly informed group, Amato and Honts cut the distribution at 5 and above. This difference in cutting scores makes it impossible to compare these results across the two surveys. Iacono and Lykken's choice of a cutting point almost certainly reduced the confidence estimate by their highly informed subjects. 4) In their chapter in the Faigman et al. book, supra, Iacono and Lykken represent their survey as a random survey. However, Iacono recently admitted under cross-examination that the Iacono and Lykken survey was in fact not based on a random sample. Drs. Raskin, Honts, and Kircher were deliberately left out of the sampling frame and thus did not have an opportunity to review, respond, or be represented in the survey. 5) Because of the serious anomaly in the data analysis and the self-admitted misrepresentation of the survey in a publication intended for the legal profession, Drs. Amato and Honts sought to obtain the data from the Iacono and Lykken survey for reanalysis. Under the ethical standards of the American Psychological Association, psychologists are required to make their data available for reanalysis by qualified scientists. On March 10, 1997, and again on April 29, 1997, Drs. Amato and Honts wrote to, first Dr. Iacono, and then to Dr. Lykken requesting the data from their survey for the purpose of reanalysis. To date, Iacono and Lykken have refused to make their data freely available for reanalysis. Given the controversial nature of their survey, and the dramatically different results from the two previous surveys, it would be

A second and more important indicator of the acceptance of polygraph testing in the scientific community is provided by the large number of original scientific studies published in peer-reviewed scientific journals. Studies reporting positive results for the validity of the polygraph have appeared in journals such as: *The Journal of Applied Psychology*, *The Journal of General Psychology*, *Psychophysiology*, *The Journal of Police Science and Administration*, *Current Directions in Psychological Science*, *Psychological Bulletin*, *The Journal of Research in Personality*, and *Law and Human Behavior*, to name but a few. To be published in any of these journals, the editor first sends an article out for review by two or three independent scientists who know the area but are not personally involved with the article under consideration. Those peer-reviewers comment on the quality of the literature review, the research design, the statistical analysis, the reasonableness of the conclusions drawn, and the appropriateness of the article for the respective journal. The Editor of the journal also reviews the article and, based on her or his evaluation and on the comments and recommendations of the reviewers, makes a decision about publication. Often revisions are required before publication. Articles with unacceptable scientific methods, statistics, or insupportable conclusions are not published. Articles which are not acceptable within the scientific discipline covered by the journal are simply not published in that journal. For example, the *Journal of Applied Psychology* rejects 85% of the manuscripts submitted to it for publication. Articles which report matters that are not acceptable psychological science do not usually make it through the peer review

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unwise to use the Iacono and Lykken data for any substantive purpose at this time.



process and are not published in the *Journal of Applied Psychology*. The *Journal of Applied Psychology* has published numerous articles on the psychophysiological detection of deception.<sup>22</sup> The publication of numerous articles in main stream journals of scientific psychology gives a clear indication that the psychophysiological detection of deception is generally accepted as valid science by the community of scientific psychologists.

The increasing acceptance of the psychophysiological detection of deception is evidenced by the increasing number of scientific publications on the topic and the involvement of a larger number of psychological laboratories. In addition, a new peer-reviewed archival scientific journal devoted to the topic of credibility assessment began publication in early 1997.<sup>23</sup>

<sup>22</sup> Some of the articles on the polygraph published in the *Journal of Applied Psychology* are as follows: P. J. Bersh, A validation study of polygraph examiner judgments, *Journal of Applied Psychology*, 399, 53 (1969); P.O. Davidson, Validity of the guilty knowledge technique: The effects of motivation, *Journal of Applied Psychology*, 52, 62-65 (1968); E. Elaad, Detection of guilty knowledge in real-life criminal investigations, *Journal of Applied Psychology*, 75, 521-529 (1990); E. Elaad, A. Ginton & N. Jungman, Detection measures in real-life criminal guilty knowledge tests, *Journal of Applied Psychology*, 77, 757-767 (1992); A. Ginton, D. Netzer, E. Elaad & G. Ben-Shakhar, A method for evaluating the use of the polygraph in a real-life situation, *Journal of Applied Psychology*, 67, 131-137 (1982); C. R. Honts, R. L. Hodes, & D. C. Raskin, Effects of physical countermeasures on the physiological detection of deception, *Journal of Applied Psychology*, 70, 177-187 (1985); C. R. Honts, D. C. Raskin, & J. C. Kircher Mental and physical countermeasures reduce the accuracy of polygraph tests, *Journal of Applied Psychology*, 79, 252-259 (1994); Supra note 16 (Horvath); Supra note 2 (Kircher & Raskin); Supra note 13 (Patrick, & Iacono); Supra note 7 (Podlesny & Truslow).

<sup>23</sup> The *Journal of Credibility Assessment and Witness Psychology* published its first issue on 7 February 1997. One of the main topics

## VI. SCIENCE HAS EXAMINED MANY OF THE TRADITIONAL CRITICISMS OF POLYGRAPH TESTING AND HAS PROVIDED DATA TO ADDRESS THEM

### A. Countermeasures

Countermeasures are anything that a subject might do in order to distort or defeat a polygraph test. Detailed reviews of the scientific literature on countermeasures are available in a number of locations.<sup>24</sup> This research leads to several conclusions. First, there is no credible scientific evidence that drugs or other countermeasures designed to affect the general state of the subject are effective against the CQT.<sup>25</sup> However, laboratory studies have suggested the possibility that training in specific point countermeasures designed to increase responding to comparison questions might be effective in producing false negative outcomes.<sup>26</sup> Nevertheless, it is also important to note that training in the countermeasures appears critical to their effectiveness. Subjects who spontaneously attempt countermeasures or are only given the information are unable to achieve effects,<sup>27</sup> and the required

identified in this journals charter was the psychophysiological detection of deception

<sup>24</sup> e. g., Supra note 18 at 373 (Honts & Perry); Charles R. Honts, *Interpreting research on polygraph countermeasures*, 15 J. POLICE SCIENCE AND ADMINISTRATION 204 (1987); Supra note 23 (Honts, et. al); Raskin et al., supra note 1.

<sup>25</sup> Id., Honts (1987); Supra note 1 (Raskin et al.); David C. Raskin, 1986 *The Polygraph in 1986: Scientific, Professional, and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, UTAH LAW REVIEW 29 (1986).

<sup>26</sup> See e.g., Honts, et al., Supra note 22.

<sup>27</sup> Rovner (1986), supra note 7; also see, Charles R. Honts, David C. Raskin, John C. Kircher, & Robert L. Hodes, *Effects of spontaneous countermeasures on the physiological detection of deception*, 16,



training is hopefully difficult to obtain.<sup>28</sup> Honts and Perry note that while there are no easy answers to the problem of countermeasures, it appears that computerized analysis of the physiological records substantially reduces the false negative rate attributable to countermeasure use.<sup>29</sup>

### B. Psychopathy and Other Psychological Conditions

The popular notion that a "pathological," "psychopathic," or "criminally hardened" liar cannot be tested successfully with the polygraph has no basis in scientific fact. "Psychopathic" or "criminally hardened" liars, including those clinically diagnosed with Antisocial Personality Disorder respond quite satisfactorily when attempting deception and are as easily detected in their deception as normals.<sup>30</sup>

Psychotic persons may not be suitable subjects for polygraph testing, but only when they experience psychotic episodes, delusions or hallucinations during the examination. Then, the subject might sincerely believe such delusions to be fact. Persons psychotic to this degree would be recognized

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JOURNAL OF POLICE SCIENCE AND ADMINISTRATION, 91 (1988).

<sup>28</sup> Supra note 18 at 376 (Honts and Perry); there are no field studies that address the countermeasures.

<sup>29</sup> Id at 374; also see supra note 22 (Honts et al., 1994).

<sup>30</sup> Numerous studies have addressed the question of whether psychopaths can beat the polygraph, e.g., Supra note 7 (Raskin & Hare); Christopher J. Patrick and William G. Iacono 74 *Psychopathy, threat, and polygraph test accuracy*. JOURNAL OF APPLIED PSYCHOLOGY, 347 (1989); also see the analysis and review by Charles R. Honts, David C. Raskin, & John C. Kircher, 19, *Effects of socialization on the physiological detection of deception*. JOURNAL OF RESEARCH IN PERSONALITY, 373 (1985).

as such by any reasonable professionally trained person. There are no traits of personality or personality disorders known to science that would allow or predispose a deceptive person to pass a properly conducted polygraph examination.<sup>31</sup>

### C. Polygraph Evidence Will Not Overwhelm The Jury Decision Making Process Resulting In Trial By Polygraph

There is an area of science known as Psychology and the Law that has addressed the impact of testimony concerning the outcome of polygraph examinations on juries. A number of studies have been conducted on this topic.<sup>32</sup> This research has been conducted both as experimental work with mock juries and by conducting post-trial interviews with jury members who had been presented with polygraph testimony. This literature is consistent in showing that juries are not inclined to give extraordinary weight to polygraph evidence. The research provides strong evidence that juries are capable of weighing and evaluating all evidence, including polygraph evidence. Moreover, juries are also capable of rendering

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<sup>31</sup> Id., Honts et al.; also see Charles R. Honts, David C. Raskin, & John C. Kircher. (1986, October). *Individual differences and the physiological detection of deception*. Paper presented at the annual meeting of the Society for Psychophysiological Research, Montreal Canada.

<sup>32</sup> e.g. Nancy J. Brekke, et al., *The Impact of Nonadversarial Versus Adversarial Expert Testimony*, 15 L. & Hum. Behav. 451 (1991). S. C. Carlson, M. S. Passano & J. A. Jannunzzo, *The Effect of Lie Detector Evidence on Jury Deliberations: An Empirical Study*. 5, J. Police Sci. & Admin. 148 (1977). A. Cavoukian & R. J. Heslegrave, *The admissibility of polygraph evidence in court: Some empirical findings*. 4, L. & Hum. Behav. 117 (1979). A. Markwart & B. E. Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*. 7 J. Police Sci. & Admin. 324 (1979).

verdicts that may be inconsistent with polygraph results. In no case did research suggest that polygraph testimony strongly or overwhelmingly affected the jury decision making process.

Typical of this research is the study done by Cavoukian and Heslegrave.<sup>33</sup> They report two experiments where cases were presented to mock juries either with or without polygraph evidence. Their mock jurors were asked to give ratings of their perceptions of the likelihood of the defendant's guilt and they were asked to render verdicts. In both experiments, in the absence of polygraph evidence, subjects tended to rate the defendant near the middle (uncertain) portion of the rating scale. This indicates that the evidence was relatively equivocal, the very type of case where polygraph evidence is likely to be offered. The addition of evidence that the defendant had passed a polygraph did shift subjects ratings in the not guilty direction, but the effect was relatively small, shifting from a mean rating of about 3 to a mean rating of about 4 (7-point scale) in one experiment and from a mean rating of about 5 to a mean rating of about 6 (9-point scale) in the other experiment. Polygraph evidence had a significant effect on verdicts in one experiment, but polygraph testimony did not have a significant effect on verdicts in a second study. All effects of polygraph testimony were eliminated by the introduction of negative testimony by an opposing witness who testified that polygraph tests were only 80% accurate and that the results of polygraph tests should be viewed with skepticism. Cavoukian and Heslegrave concluded that concerns about blind acceptance and overwhelming impact of polygraph tests are unjustified. We concur.

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<sup>33</sup> Id.

Recent research conducted at the University of North Dakota<sup>34</sup> has replicated and extended the findings of the research described above. In the context of a mock trial, polygraph testimony was contrasted with testimony concerning identification based on a blood test. The findings consistent showed that mock-jurors were more skeptical of polygraph testimony than they were of blood test testimony, even when the experts reported them to be of the same level of accuracy. There were no indications in any of the studies that polygraph evidence overwhelmed jurors or that they were unable to use and value evidence that ran contrary to the polygraph outcome. We know of no data, published or unpublished that supports the notion that juries give undue weight to polygraph evidence, or that they are unable to evaluate and weigh polygraph evidence in the context of other testimony given at trial.

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<sup>34</sup> L. Vondergeest, C. R. Honts, & M. K. Devitt, *Effects of Juror and Expert Witness Gender on Jurors' Perceptions of An Expert Witness*, MODERN PSYCHOLOGICAL STUDIES, 1 (1993). M. K. Devitt, C. R. Honts, & B. Gillund, *Stealing thunder does not ameliorate the effects of the hired gun cross-examination tactic*. Paper presented at the annual meeting of the American Association for Applied and Preventive Psychology, Chicago (1993). C. R. Honts, M. K. Devitt, & S. Amato, *Explanatory style predicts perceptions of expert witness believability*. Paper presented at the annual meeting of the American Association of Applied and Preventive Psychology, Chicago (1993). C. R. Honts, & M. K. Devitt, *The hired gun cross-examination tactic reduced mock jurors' perception of expert witness' credibility*. Paper presented at the biennial meeting of the American Psychology-Law Society/Division 41 San Diego, CA (1992).

#### D. Polygraph Tests Run Under Confidential Circumstances For The Defense Are No Less Valid

Although not at issue in the present case, one common criticism offered against the polygraph is that polygraph examinations conducted in confidence for a defense attorney are less valid than polygraph examinations conducted for law enforcement. This notion has been addressed scientifically and has been found to be without merit.<sup>35</sup> We know of no evidence, published or otherwise, that supports this notion.

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<sup>35</sup> This notion, known as the Friendly Polygraph Examiner Hypothesis (FPEH) was discussed at length by Honts & Perry, *Supra* Note 18 at 357 and the notion was found to be without validity. The issue was recently revisited by Charles R. Honts, *Is it time to reject the friendly polygraph examiner hypothesis (FEPH)?*, a paper presented at the annual meeting of the American Psychological Society, Washington, D.C (1997, May). The Honts analysis of the FPEH is as follows: The FPEH suggests that polygraph examinations conducted for the defense on a privileged and confidential basis are more likely to produce false negative outcomes than when subjects know that the examiner will report adverse outcomes. The FPEH assumes that if the subject expects that only a favorable outcome will be reported, the subject will have little at stake and will have no fear of the detection of deception. It is surmised that this lack of fear of the detection of deception will reduce the threat posed by the crime-relevant questions in the polygraph examination and the guilty subject will be more likely to pass. Two basic assumptions underpin the FPEH: (1) Fear of the detection of deception is necessary for the CQT to function. (2) There is no fear of detection of deception (or other motivation) in a confidential polygraph examination. First, there is no basis for assuming that fear of the detection of deception is necessary for the CQT to function. Physiological detection of deception has been demonstrated in numerous laboratory studies under no motivation, reward motivation, punishment, and even when the subjects did not know they were in a detection of deception situation. No differences between these motivational conditions has been reliably observed. Although fear may be sufficient for the detection of deception, it clearly is not necessary. Fear is not an important part of any modern theory of CQTs. Even if fear were necessary for detection, it does not follow that a reduction in fear would

#### VII. PROBLEMS ASSOCIATED WITH POORLY CONDUCTED EXAMINATIONS CAN EASILY BE REMEDIED

Honts and his colleagues<sup>36</sup> have noted that the greatest challenge facing the polygraphy is the generally poor training of many polygraph examiners. However, Honts and Perry suggest that New Mexico Rule of Evidence 707 remedies most of the problems associated with poor examiner practice.<sup>37</sup> The single most important provision of New Mexico Rule 707 is a requirement that polygraph examinations be tape recorded. With a tape recording all of the actions of the examiner and the subject are available for scrutiny. If the examiner engaged in any unacceptable practices, those will be obvious to opposing experts and could serve as useful topic for impeachment of the expert witness. The second important requirement of New Mexico Rule 707 requires that all polygraph examinations taken by the subject be disclosed

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allow a deceptive person to pass the test. The CQT requires differential reactivity between relevant and comparison questions. A reduction in fear would reduce the fear associated with both question types thus maintaining the differential reactivity between the two. Since these tests are evaluated within-subjects, and not against a normative standard, the effect of reducing the motivation level (fear) would be nil. Finally the FPEH's assumption that there is no fear (or any motivation) in a confidential polygraph is unrealistic. The subject of a confidential polygraph in a criminal case has a clear motivation, the gain she or he will receive from passing the test. Clearly this is a more powerful motivation than the small monetary rewards used in most laboratory studies. Additionally, Honts presented data from both the laboratory and the field that refute the FPEH. *See supra*, Honts paper presented to APS in Washington, D.C. (May, 1997).

<sup>36</sup> *Supra* note 18 at 369 (Honts & Perry); *Supra* note 2 at 998 (Honts & Quick).

<sup>37</sup> *Supra* note 18 at 372 (Honts & Perry).



if any result is to be offered as evidence. This prevents or at least discloses any effort by counsel to shop for a favorable result. Finally, Honts and Perry suggest that the traditional methods of cross-examination can be very effective in revealing incompetence on the part of polygraph examiners.<sup>38</sup>

#### **VIII. THE UNITED STATES MILITARY HAS PARTICULARLY STRONG STANDARDS FOR TEST ADMINISTRATION AND QUALITY CONTROL**

Honts and Perry, although critical of the general level of training for polygraph examiners, note that the Department of Defense Polygraph Institute is "generally considered to be the best training facility for polygraph examiners."<sup>39</sup> All polygraph examiners for the AFOSI have received training at the Department of Defense Polygraph Institute. The United States military polygraph programs maintain strict guidelines for the administration of polygraph tests and every polygraph in a criminal case is reviewed by two levels of quality control, one at operational field level by the field supervisor, and then at the program's headquarters. Examiners who produce substandard work receive additional training or are reassigned to other duties.

#### **IX. WITHOUT THE POLYGRAPH, HUMANS ARE NOT VERY GOOD AT DETECTING DECEPTION**

<sup>38</sup> Id at 371, including topics for cross-examination of polygraph examiners.

<sup>39</sup> Id at 359.

Although the role of credibility assessment has traditionally been left to juries, scientific research suggests that the average person is not very good at detecting deception. This research has been reviewed on a number of occasions and the reviews converge on a conclusion that without an intimate knowledge of the individual, or instrumental assistance, the average adult, including lawyers, judges, police officers, intelligence officers and psychologists are, at best, only slightly better than chance at detecting deception by adults or children.<sup>40</sup> Thus given the validity data for the polygraph described above, it would appear that a properly conducted polygraph test would offer valid and helpful information to the trier of fact in his or her task of assessing credibility in context of a criminal trial.

#### **CONCLUSION**

For the foregoing reasons, the members of the Committee of Concerned Social Scientists respectfully submit that polygraph testing is a valid application of psychological science and that it is generally accepted by the majority of the informed scientific community of psychological scientists as such. Polygraph testing has a known but acceptable error rate that has been well defined by scientific research. Furthermore, there is no scientific evidence that suggest the admission of the results of a polygraph examination before lay jurors will overwhelm their ability to use and value other

<sup>40</sup> See reviews by Paul Ekman *TELLING-LIES* (1986); Paul Ekman and Maureen O'Sullivan 46, *Who can catch a liar?* 913 *AMERICAN PSYCHOLOGIST* (1991); Bella M. DePaulo 3 *Spotting lies: Can humans learn to do better?* 83 (1994); Marcus Tye, *EFFECTS OF EXPERT STATEMENT VALIDITY ASSESSMENT TESTIMONY ON LAY EVALUATIONS OF CHILDREN'S STATEMENTS*, approved doctoral dissertation, the University of North Dakota (1996).

evidence. Overwhelming the trier of fact is particularly unlikely when the quality and training of the members of a court martial are considered. Many of the traditional objections to the polygraph have been shown by science to be without merit. Although there are problems with the quality of practice in the polygraph profession, such problems are not unique to polygraph test. They are likely to occur in any situation where a human evaluator is needed to interpret data. In any event, the problems of examiner practice are easily remedied by the traditional means of cross-examination and evidentiary rule. Finally, research indicates that average person could benefit from a valid credibility assessment technique like the polygraph.

We respectfully urge the Court to deny the petitioner's request to set aside the decision of the United States Court of Appeals for the Armed Forces in this case.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'C. F. Peterson', written over a horizontal line.

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No. 96-1133

## IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA,  
Petitioner,

v.

EDWARD G. SCHEFFER,  
Respondent.ON WRIT OF CERTIORARI  
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FOR THE ARMED FORCESBRIEF OF NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS  
AS AMICUS CURIAE IN SUPPORT OF  
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ON WRIT OF CERTIORARI  
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FOR THE ARMED FORCES

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**BRIEF OF NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS  
AS *AMICUS CURIAE* IN SUPPORT OF  
RESPONDENT**

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This *amicus curiae* brief is submitted in support of the position of the Respondent Edward G. Scheffer. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.<sup>1</sup>

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<sup>1</sup> As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.



## INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 9,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure due process in the administration of the criminal justice process, which fundamentally requires that the accused be afforded a fair opportunity to defend against the government's accusations. That opportunity cannot be guaranteed without recognition of the right to have relevant, probative evidence considered by the factfinder and tested in the crucible of the adversary process, absent some overriding policy justification for refusing to hear the evidence.

NACDL submits this brief because the government's effort to reverse the Court of Appeals and reinstate the blanket exclusionary rule barring an entire field of scientific evidence, without regard to any showing of reliability or relevance in a particular case, would impede the discovery of truth in the courts and increase the risk of convicting the innocent.

## SUMMARY OF ARGUMENT

This case involves a categorical exclusionary rule which withholds from the factfinder any probative and exculpatory polygraph evidence offered on behalf of the accused under any circumstances.

Unjustifiable exclusionary practices have been a chronic occurrence with regard to scientific polygraph evidence. The adjudicatory process in American courts has been unnecessarily sheltered from developments in an important body of scientific knowledge about the psychophysiological processes of the human body, while most other segments of society, including notably law enforcement and the federal government in general, have been actively putting that scientific knowledge to work for their own factfinding purposes.

Rather than trust the courts to deal with the admissibility of this area of scientific expertise in accordance with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the executive branch of government has relied on empirically unfounded apprehensions and misconceptions about the polygraph to impose a *per se* ban on any consideration of the evidence. The purported justifications for this extraordinary categorical exclusion of an entire field of science are not supported by either research or empirical experience.

The result is the denial of the accused's sixth amendment right to present relevant and reliable exculpatory evidence to the trier of fact.

## ARGUMENT

### I. THE BLANKET EXCLUSION OF ALL RELEVANT AND RELIABLE POLYGRAPH EVIDENCE DENIES THE ACCUSED'S SIXTH AMENDMENT RIGHT TO CALL WITNESSES IN HIS DEFENSE.

#### A. Historical Context of Rule 707.

##### 1. The Traditional Apprehension and Fear of Polygraph Evidence.

There is no single category of evidence in the history of American law that has been subjected to stricter scrutiny by the courts, to greater government resistance against admission and to such a widespread reluctance to accept scientific realities in the courtroom than has been the case with polygraph evidence. *See, e.g., James R. McCall, Misconceptions and Reevaluation - Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363.

In a sense, uninformed skepticism should no longer be surprising. The polygraph measures phenomena occurring inside the body that we cannot perceive without the assistance of this scientific instrument, much as we cannot perceive that the earth is not flat by looking out the window. We can observe external manifestations of consciousness of deception, which we have recognized historically as demeanor evidence or as circumstantial evidence of consciousness of wrongdoing, but we cannot see the very real internal activities that ultimately cause these phenomena to occur.

To many who have not seriously studied the scientific underpinnings and the thorough validity testing of the

polygraph, it can appear to be something akin to a magic box or to have aspects of the paranormal. Those who have never actually observed the presentation of polygraph evidence before a jury fear that it will have "an aura of near infallibility, akin to the ancient oracle of Delphi." *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).<sup>2</sup>

This initial resistance of the uninformed cuts across all walks of life, even including such groups as scientists, juries, lawyers and judges. Even those who have become the technique's strongest scientific supporters have done so only after thorough research, testing and experience have caused them to reassess their prejudgments. *See, e.g., United States v. Galbreth*, 908 F. Supp. 877, 883 (D.N.M. 1995). It is therefore not surprising that well-intentioned people who have not thoroughly studied nor had practical experience with polygraphs are honestly apprehensive about the validity of the science or its feared effect on the adjudicatory process. At some point, however, supposition has to give way to science, and good faith yet erroneous assumptions must be replaced by realities.

The blanket exclusionary opinions cited by the government and the *amicus* attorneys general in their briefs illustrate the unique reception that polygraph evidence has received historically in our adjudicative processes. There were only occasional exceptions to that trend before 1993, such as the Eleventh Circuit's opinion in *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1988), and the New Mexico Supreme Court's admissibility decision in *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975), which led that court to promulgate an evidentiary rule in 1983 to set

<sup>2</sup> That often quoted apprehension has never been substantiated by a single scientific experiment or empirical study over the two decades of its repetition. In fact, the evidence is all to the contrary. *See* Point IB3, *infra*.

standards of admissibility for polygraph evidence in the New Mexico courts. N.M. R. EVID. 11-707 (Michie 1997). See Point IB3, *infra*.

Even those judicial opinions which have acknowledged the reality of the developments in the hard<sup>3</sup> science of psychophysiology, the parent science upon which the modern polygraph examination is based, still express trepidation about accepting the evidentiary consequences of those scientific developments. See, e.g., *United States v. Piccinonna*, 885 F.2d 1529, 1537 (11th Cir. 1989) ("We proceed with caution in this area . . ."); *United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (concerned about opening a "legal Pandora's box"). Other opinions candidly acknowledge outright hostility. *United States v. Cordoba*, 104 F.3d 225, 232 (9th Cir. 1997) ("We have long expressed our hostility to the admission of unstipulated polygraph evidence . . . . With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence.").

The pervasive hostility found a supporting rationale for many decades in both the "general acceptance" requirement of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and in unscientific hunches and doubts about the reliability of polygraph evidence that continued to ignore the scientific realities that were becoming well known outside the courthouse walls.

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<sup>3</sup> McCall, *supra*, at 368 n.24. Psychophysiology, a recognized scientific specialty within the field of psychology, deals with the measurable interaction between human physiology and psychology. The scientific polygraph instrument has long been used in various contexts to measure and record simultaneously various physical reactions to measure changes in the human body that relate to psychological states.

## 2. Recognition of Scientific Realities.

Two judicial opinions can be credited for breaking this trend. The first was the Eleventh Circuit's *en banc* decision in *United States v. Piccinonna*, *supra*, which thoroughly studied the controversy and determined that "since the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique"; that "the FBI, the secret service, military intelligence and law enforcement agencies use the polygraph," 885 F.2d at 1532; that "in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool"; that there is "a lack of evidence that juries are unduly swayed"; and that "a per se rule disallowing polygraph evidence is no longer warranted." 885 F.2d at 1535. That court therefore articulated standards for admissibility of polygraph evidence which were designed to "achieve the necessary balance." *Id.* Polygraph evidence has been admissible in the Eleventh Circuit under those standards since 1989 without reported difficulties. *United States v. Padilla*, 908 F. Supp. 923 (S.D. Fla. 1995); *Elortegui v. United States*, 743 F. Supp. 828 (S.D. Fla. 1990).

The most important opinion, however, came several years after *Piccinonna*, when this Court expressly overruled *Frye* in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Before *Daubert* was decided, most courts had steadfastly refused to acknowledge the mounting evidence of the scientific basis and the modern realities of the polygraph. After *Daubert*, mere citations to *Frye* or conclusory *ipse dixit* statements that the polygraph was unreliable, or was unscientific, or was not generally acceptable, could no longer justify a refusal to look at the underlying science and the developments in testing and administration of the modern control question polygraph.



A number of circuit courts have acknowledged that they must now undertake the objective analysis that this Court mandated in *Daubert* before refusing to permit a jury to consider scientific polygraph evidence. See, e.g., *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997); *United States v. Pulido*, 69 F.3d 192 (7th Cir. 1995); *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995). The courts which have been willing to put aside earlier prejudgments and take a serious analytical look at the scientific evidence in a *Daubert* hearing have agreed that the modern control question polygraph is reliable scientific evidence under Rule 702 of the Federal Rules of Evidence. See, e.g., *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995); *Ulmer v. State Farm Fire & Casualty Co.*, 897 F. Supp. 299 (W.D. La. 1995).

### 3. The Shift Away from Scientific Reliability Analysis to Evidentiary Blackballs.

Unfortunately, *Daubert* has not served to change the ultimate reality of *per se* exclusionary practices. The major change in many post-*Daubert* cases has not been a change toward acceptance of the consequences of the opinion, but rather has been a shift in the stated rationales for what are, in effect, continued *per se* refusals to admit the polygraph evidence.

More recent stated grounds have tended to avoid the scientific realities and have instead recited Rule 403 discretion and other recurring exclusionary theories. See, e.g., *United States v. Pettigrew*, 77 F.3d 1500, 1515 (5th Cir. 1996) (refusing admission because the defense did not notify the prosecution of its intention to introduce favorable polygraph results before the defense expert had even administered the examination); *United States v. Sherlin*, 67

F.3d 1208, 1217 (6th Cir. 1995) (could not introduce defendant's unstipulated polygraph because his credibility was "maybe the central issue in this case"); *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (excluding defendant's polygraph where the results were allegedly peripheral to the "core issues"); *Palmer v. City of Monticello*, 31 F.3d 1499, 1506 (10th Cir. 1994) (simply reciting that there was no abuse of discretion in excluding the evidence, without discussion of the particular prejudice or probative value necessarily involved in the exercise of Rule 403 discretion).

This case exemplifies another tactic of excluding what can prove to be relevant and reliable scientific evidence otherwise admissible under *Daubert*: the exercise of executive or legislative fiat to circumvent court opinions and the adjudicative process by imposing a blanket exclusionary ban on judicial consideration of any polygraph evidence, no matter how relevant or reliable it can be shown to be in a particular application. For example, in *Witherspoon v. Superior Court*, 133 Cal. App. 3d 24, 183 Cal. Rptr. 615, 621 (Ct. App. 1982), the court reviewed the status of the modern polygraph and concluded that there is "nothing so unique about the polygraph examination that justifies the court's continuing to treat it as an evidentiary pariah." Noting that the widespread rejection of the polygraph appeared to be based less on any demonstrable lack of reliability of the test than on an unrealistic fear that lay juries would tend to be overly impressed, the court held that polygraphs could be admitted subject to traditional evidentiary regulation, such as determinations of probative value and prejudicial impact in particular cases. *Id.* at 618-621.

The California legislature responded to *Witherspoon* by imposing a categorical ban to prohibit introduction of polygraph evidence in criminal cases only. CAL. EVID.

CODE § 351 (Deering 1996). Interestingly, for well over a decade, polygraph results have continued to be admissible in civil cases in California, see *Kathleen W. v. Shirley W.*, 190 Cal. App. 3d 68, 235 Cal. Rptr. 205 (Ct. App. 1987), with no reported adverse effect on the civil justice system in that state. See James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility after Rock and Daubert*, 1996 U. ILL. L. REV. 363, 390. The statute also allows factfinders to rely on the results of polygraph examinations in making their factual determinations in criminal cases if the opposing party stipulates<sup>4</sup> to the administration and admission of the polygraph. *Id.*

The rule now before the Court had a similar genesis. In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), the court anticipated *Daubert* in determining that polygraph results can be scientifically reliable evidence which must be admitted under the military counterparts to the federal rules on expert testimony. Not only did *Gipson* conclude from its review of the scientific polygraph evidence that "the greater weight of authority indicates that it can be a helpful scientific tool," *id.* at 249, the court relied on the widespread reliance on polygraph results throughout the country, particularly in

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<sup>4</sup> The frequently-encountered stipulation approach, "prevalent in most circuits," *United States v. Crumby*, 895 F. Supp. 1354, 1356 (D. Ariz. 1995), cannot be justified on any sound jurisprudential basis. See, e.g., *United States v. Oliver*, 525 F.2d 731 (8th Cir. 1975) (Polygraph evidence reliable enough to be admitted over defendant's objection where he had agreed to stipulate admissibility before taking test). If the evidence is relevant and reliable, opposing counsel should not have the unilateral power to decide whether the jury should hear it. And if it were not relevant and reliable, why should a jury be permitted to use it as a basis for important factual determinations? Surely, courts of law would not countenance using the results of trial by ordeal or combat or the testimony of a ouija board interpreter, no matter how much advance stipulation by the parties had taken place.

military and other federal government factfinding processes, and on the published research showing that juries are quite capable of evaluating the evidence.

#### 4. The Promulgation of Rule 707.

The government did not seek certiorari in this Court to review the *Gipson* record. Instead of resolving the issue through judicial channels, the federal government responded with Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991), which promulgated MILITARY R. EVID. 707 to block the effect of the *Gipson* holding. The written explanation supporting the rule contained conclusory recitations that polygraph would adversely affect the jury and consume undue amounts of time, all without citing a single scientific laboratory or empirical study to support those declarations. Instead, it relied on pre-*Daubert* court opinions which had rejected polygraph evidence historically, generally without analysis of the numerous published scientific studies.

The effect of the rule is to preclude the possibility of any *Daubert* foundation or other showing of reliability, relevance, necessity or any other evidentiary consideration in any particular case. It also absolutely bars the courts from considering any further developments in the science over the coming years. It essentially freezes the evidentiary processes of the courts into a complete prohibition of an entire category of scientific evidence. There is no valid justification for such an extraordinary absolute bar. It is just as violative of the Sixth Amendment as similar blanket prohibitions struck down by this Court in *Washington v. Texas*, 388 U.S. 14 (1967), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44 (1987).



**B. Rule 707's Categorical Ban is Unjustified by Science, Experience or Jurisprudence.**

The primary purported justifications for Rule 707 relate to fears about polygraph reliability, about taking up the time of the courts and about the polygraph's supposed intrusion on the function of the jury. None of those fears is justified.

**1. The Specific-Issue Control Question Polygraph Satisfies the *Daubert* Scientific Evidence Analysis.**

The trial court below refused to afford the accused an opportunity to present his evidence and refused to conduct a *Daubert* hearing on the scientific reliability of polygraph evidence. Instead, the court relied solely on the *per se* rule and its conclusory justifications to exclude the evidence without considering its scientific reliability or its relevance in this particular case.

Although the government makes some partial concessions to the scientific reliability of the polygraph in its brief, *see, e.g.*, Br. of U.S. n.7, it relies on critics of polygraph, notably the minority view of the Lykken-Iacono "Minnesota" school of oppositionists, to argue that the polygraph is not scientifically reliable. However, not only is the existence of disagreement in the scientific community not a ground for exclusion under *Daubert*, a serious study of the hundreds of articles and published laboratory and field studies leads to the conclusion that the specific-issue control question test provides scientific evidence which meets the *Daubert* standards set by this Court. *See, e.g.*, *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995). *Amicus* will not repeat here the scientific analysis in the *amicus* brief filed by the Committee of Concerned Social Scientists, in the

voluminous published studies and in the opinions of the growing number of courts which have addressed the scientific issue. However, there is another consideration on the reliability issue that should be addressed.

The Justice Department's policy is to oppose the use of polygraph evidence in court (Br. of U.S. n.5), but it is a truism of human experience that actions speak more loudly than words. The very government that is contesting so vigorously the consideration of polygraph evidence on the part of the accused has repeatedly admitted the validity and reliability of the control question polygraph for years by both word and deed.

By 1982, the Office of Technology Assessment reported that federal agencies conducted over 22,000 polygraph examinations annually, and the numbers were increasing. OFFICE OF TECHNOLOGY ASSESSMENT, 98TH CONG., SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION - A TECHNICAL MEMORANDUM, app. at 107 (1983) ("OTA Report"). As acknowledged by the Director of Research for the Department of Defense Polygraph Institute, which trains the majority of the hundreds of federal polygraph examiners, the polygraph is routinely used as a factfinding technique in criminal investigations throughout the United States. Gordon H. Barland, *The Polygraph Test in the USA and Elsewhere*, in *THE POLYGRAPH TEST* 73, 75 (Anthony Gale ed., 1988). By 1988, there were already over 300 active federal examiners in all branches of the armed forces, the FBI, CIA, NSA, U.S. Postal Service, Secret Service, DEA, BATF, U.S. Marshal Service, U.S. Customs and Defense Investigative Service. *Id.* at 76. Just this last year, the Department of Defense alone conducted over 12,000 polygraph exams. DOD POLYGRAPH INSTITUTE, 105TH CONG., FISCAL YEAR 1996 REPORT TO CONGRESS ON THE DOD POLYGRAPH PROGRAM 1 (1997) ("DOD Report").



These examinations are not conducted for experimental purposes; they are conducted because the government knows they are a useful aid in their factfinding processes:

This report contains numerous examples of polygraph utility in resolving counter-intelligence and security issues as well as criminal investigations. The polygraph is clearly one of our most effective investigative tools.

DOD Report, *supra*, Executive Summary.

As Special Agent James K. Murphy, the Chief of the 80-agent polygraph unit of the FBI has publicly acknowledged, "the polygraph technique, when properly used by competent, well-trained examiners, possesses a high degree of accuracy." James K. Murphy, *The Polygraph Technique: Past and Present*, FBI LAW ENFORCEMENT BULLETIN, June 1980, at 5.

The government's brief improperly relies on the 1983 OTA Report as supporting its reliability attack. (Br. of U.S. at 19-21). The areas of criticism in the report were focused on the problems with non-specific employment screening tests, methodologies of particular researchers, inadequately trained examiners and techniques other than the specific-issue control question test. All of the concerns were legitimate and none supports the exclusion of a numerically scored, standardized control question test administered, as in this case, by a well-qualified examiner. John C. Kircher & David C. Raskin, *Polygraph Techniques: History, Controversies, and Prospects*, in *PSYCHOLOGY AND SOCIAL POLICY* 295, 300 (Peter Suedfeld ed., 1992).

The employment screening test problem, which improperly uses polygraph to try to test general honesty rather than specific instances of conduct, was resolved by federal legislation, with the help of prominent polygraph researchers such as Professor Raskin. The Employee

Polygraph Protection Act of 1988, 29 U.S.C. § 2001, et seq., prohibits such screening tests by private employers, preserves the ability to conduct tests on specific financial misconduct issues, 29 U.S.C. § 2006(d), and grants the government a complete exemption from any of the prohibitions in the Act. 29 U.S.C. § 2006(a). *Stehney v. Perry*, 101 F.3d 295 (3d Cir. 1996).

With regard to untrained examiners or lack of procedures, the federal government has been particularly active in training and standardization, consistently with the standards of most reputable examiners and numerous state regulatory agencies. DOD Report, *supra*, at 14. The test results can therefore be independently analyzed, scored and critiqued. *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995).

Scientific research on the control question technique has continued since the OTA Report, with the accuracy rates centering around the 90-95% level. *United States v. Crumby*, 895 F. Supp. 1354, 1360; David C. Raskin, *Polygraph Techniques for the Detection of Deception*, in *PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE* 247, 268 (David C. Raskin ed., 1988). Even at the time of the 1983 OTA Report, "[t]he control question test was found to detect guilty subjects with a relatively high degree of accuracy,"<sup>5</sup> OTA Report, *supra*, at 70.

Government officials who vigorously oppose the use of polygraph evidence by the accused find it reliable enough

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<sup>5</sup> The report went on to express a concern about the rate of false positive errors in some of the studies it surveyed. A false positive error is one which improperly concludes an honest subject is being deceptive, and it occurs in about 5% to 10% of the tests. It is not relevant to the Scheffer test. See *United States v. Galbreth*, *supra*, at 891 and *United States v. Crumby*, *supra*, at 1360.

to use in their decision-making, despite their concern that it is too unreliable for ordinary jurors to deal with. The government routinely uses the polygraph against the accused in such decision-making contexts as determinations of probable cause for arrest, *Bennett v. City of Grand Prairie*, 883 F.2d 400 (5th Cir. 1989), *Johnson v. Schneiderhein*, 102 F.3d 340 (8th Cir. 1996); decisions to prosecute, *Brodnicki v. City of Omaha*, 75 F.3d 1261 (8th Cir. 1996); forfeiture of a defendant's property, *United States v. Haselden*, No. 95-5610, 1996 U.S. App LEXIS 32989 (4th Cir. Dec. 17, 1996)<sup>6</sup>; prison disciplinary proceedings, *Stone-Bey v. Debruyne*, No. 95-3214, 1996 U.S. App. LEXIS 30012 (7th Cir. Nov. 14, 1996); parole revocation proceedings, *Martin v. Parker*, No. 90-3746, 1991 U.S. App. LEXIS 2526 (6th Cir. Feb. 13, 1991); conditions of plea agreements, *United States v. Lewis*, 110 F.3d 417 (7th Cir. 1997); to vouch for the credibility of government witnesses, *United States v. Winkelman*, No. 96-5365, 1996 U.S. App. LEXIS 30169 (6th Cir. Nov. 15, 1996), *United States v. Fern*, Nos. 95-4099, 95-4596, 1997 U.S. App. LEXIS 18942 (11th Cir. July 24, 1997); in determining whether to agree to a downward departure in sentencing, *United States v. Morrison*, No. 95-8562, 1996 U.S. App. LEXIS 27409 (4th Cir. Oct. 22, 1996); and numerous other uses. See generally James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363, 379.

Although a review of the scientific literature and of the *Daubert* findings in litigated cases ought to support the

<sup>6</sup> A computer search for federal polygraph cases discloses a large number of decisions that are designated as not to be reported. To the extent those decisions are referenced in this section, they are not cited for their precedential value in any way, but simply for the factual data revealed in them.

conclusion that the polygraph is scientifically reliable, that issue is really not one that need be addressed at this time. By its ruling below, the court relied on a *per se* exclusionary rule that prevented a litigant from making the *Daubert* showing that this Court has determined should be made at the trial court level in determining the admissibility of scientific evidence. The trial court instead upheld the blanket exclusionary rule without any evidentiary justification submitted in its support by the government. The extant evidence available to this Court, however, should show that a blanket exclusionary rule barring polygraph from *Daubert* consideration now and in the future cannot be justified on even a judicial notice or "executive notice" theory.

## 2. Polygraph Evidence Is Not Unduly Time-Consuming.

There is no empirical study that supports any conclusion that polygraph evidence is generally more time-consuming than the diverse variety of scientific evidence that the courts deal with in the course of litigation on a regular basis.<sup>7</sup> There is absolutely no reason why potential disputes over qualifications, foundations, cross-examination and disagreements among experts need take any more time for polygraph than it does for DNA, psychiatric disputes, legal economics or the issues about hypnotized witnesses that this Court faced in *Rock v. Arkansas*, 483 U.S. 44 (1987). The problem of the battle of the experts "is present in every area of expert testimony and the best solution is the discerning judgment of the jury," subject to the trial court's gatekeeping discretion. *State v. Mendoza*, 80 Wis. 2d 122, 163, 258

<sup>7</sup> In fact, the evidence is to the contrary. See Robert B. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 ABA JOURNAL 162 (1982), discussed more fully in Point IB3, *infra*.



N.W.2d 260, 278 (1977).

The only reported case where any dispute about polygraph evidence has consumed more than a day or two, at the most, has been the inexplicable consumption of four days in *Commonwealth v. Mendes*, 406 Mass. 201, 547 N.E.2d 35 (1989), cited in the government's brief. Whatever the reasons that caused a hearing of that length in that particular case on polygraph-related issues, there is certainly no showing that such an experience is the rule, rather than the exception. In any event, no other body of scientific evidence has ever been categorically excluded because of time consumption considerations.

Rule 403 of the Federal Rules of Evidence certainly provides a trial judge with the appropriate tools to balance all appropriate considerations and determine in a particular case when relevant evidence will simply take too much court time to justify its admission. Even in the exercise of that exclusionary discretion, "Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value." *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986), quoting Weinstein's Evidence, ¶ 403[06] at 403, 59-60 (1982); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981); *Bower v. O'Hara*, 759 F.2d 1117 (3d Cir. 1985).

### 3. Polygraph Evidence Does Not Intrude on the Function of the Jury.

The government articulates to this Court the apprehension that polygraph evidence will wreak some fundamental change in our system of trial by jury, by supplanting the jury with a decision-making box, by overwhelming the jury into unthinking agreement with the polygraph expert or by sending them into a state of confusion. Those fears are demonstrably unfounded.

The polygraph does not function as the ultimate decision-maker of guilt or innocence, and the polygraph expert cannot possibly replace the ultimate function of the jury in that regard, any more than can the DNA expert, the drug-screen expert in the court below, or any other expert witness that juries hear day in and day out in courts of law throughout the nation.

The specific issue control question polygraph test focuses on particular fact issues rather than the ultimate trial decision. It provides circumstantial evidence of consciousness of deception or truthfulness by a particular witness on a particular fact question at the time of the administration of a polygraph exam. By comparing the subject's involuntary autonomic nervous system's reactions to the relevant questions in the case with the subject's reactions to known lies, the test provides objective and scientific evidence of the likelihood of the test subject's own consciousness of truth or deception on discrete factual questions. It does not determine ultimate issues of guilt or innocence, but simply provides additional circumstantial evidence for the factfinder to consider, along with all other evidence.

Juries have traditionally been encouraged to consider observations of external demeanor as guides to determining consciousness of truthfulness or deception by a witness, despite the known difficulties in making accurate judgments in that manner. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AMERICAN PSYCHOLOGIST 913 (1991). Flight, evidence tampering, obstruction of justice and numerous other physical activities reflecting consciousness of guilt have routinely been admissible in all courts. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT § 3:04 (1996). Similarly, circumstantial evidence of subjective consciousness of innocence "may be admitted as relevant to show defendant's lack of guilty



knowledge." JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 401.08[4] at 401-59 (Joseph M. McLaughlin ed., 2d ed. 1997).

Even on the focused questions of relevant fact which are the subject of the polygraph examination, the jury will be advised that the polygraph is neither magic nor foolproof, any more than the urine analysis<sup>8</sup> in this case. The accused in this case may or may not have been guilty, but that is for the factfinder to decide after consideration of all the evidence bearing on the issue. There is simply no credible evidence that the polygraph will replace our time-honored tradition of evaluation of all the evidence by a jury of peers with a polygrapher or any other expert witness.

The fear that scientific evidence will overwhelm or confuse the jury is not unique to polygraph evidence. This Court recently addressed and rejected it in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993):

Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudo-scientific assertions. In this regard Respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system—generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but

<sup>8</sup> One might reasonably expect that the urinalysis expert is more likely to be treated as the "Delphi oracle" than the polygrapher, despite comparable error rates for the evidence.

admissible evidence. See *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

This Court noted that these conventional devices, rather than wholesale exclusion, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Not only is the fear of the jury's vulnerability inconsistent with our adversarial system of justice, it is an apprehension that has been proven in scientific studies and practical experience to be absolutely unfounded. Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes and Challenges*, 16 LAW AND HUMAN BEHAVIOR 357, 366 (1992); David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 64-66. Cases which have reviewed the literature<sup>9</sup> have concluded that there is no evidence to support the fear that the polygraph evidence will confuse or mislead the jury. See, e.g., *United States v. Piccinonna*, 885 F.2d 1529, 1533 (11th Cir. 1989) (the "studies refute the proposition that jurors are likely to give disproportionate weight to polygraph evidence."); *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1048-49 (S.D.N.Y. 1995); *United States v. Galbreth*, 908 F. Supp. 877, 895 (D.N.M. 1995).

The *Galbreth* opinion applied a *Daubert* analysis to polygraph evidence and rejected the kinds of unsubstantiated fears being relied on by the government before this Court. *Galbreth* was authored by a federal judge sitting in a state that has over two decades of practical experience with the use of polygraph evidence in the courts. In fact, New Mexico has the only sustained period of general admission of unstipulated polygraph results in any United States

<sup>9</sup> Some of the voluminous literature on the subject is collected in the brief for *Amicus Curiae* Committee of Concerned Social Scientists.

jurisdiction.

In 1973, New Mexico adopted the federal rules of evidence from this Court's proposed draft, before Congress formally amended and adopted the rules for the federal court. See Leo M. Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 N.M. L. REV. 187 n.1 (1976). The first case in the New Mexico Supreme Court addressing new Rule 702 reached the same result as did *Daubert* in this Court almost two decades later in determining that the outdated *Frye* test had been replaced by a standard of more open admissibility. *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). The court concluded that a blanket exclusion of unstipulated polygraph evidence was mechanistic in nature and inconsistent with the thrust of the modern rules of evidence.

In 1983, the court followed up on its *Dorsey* opinion by promulgating New Mexico rule of evidence 11-707, which has remained in effect since that date to provide procedures for pretrial notice, discovery and admissibility of polygraph evidence. N.M. R. EVID. 11-707 (Michie 1997). See generally James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363, 385-88.

While apprehensions were being expressed in courts which had no opportunity to observe what happens when unstipulated polygraph evidence is admitted before real juries, for the last two decades New Mexico quietly administered justice in its own courts with no reported adverse effects resulting from its lack of a *per se* exclusionary rule against polygraph evidence. The few litigated cases reported during that time have dealt with clarifying admissibility, discovery and other procedural requirements. See, e.g., *State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995); *Baum v. Orosco*, 106 N.M. 265, 742 P.2d

1 (Ct. App. 1987).

After 22 years of the doors of the New Mexico courts being open to the consideration of expert polygraph testimony, the results have been described within the state as follows:

Twenty years of wide open admissibility and mock jury experiments elsewhere have shown that jurors quite capably deal with the evidence just as they deal with other expert evidence, with a healthy degree of skepticism. It is no more confusing to the average jury than a great deal of psychiatric, medical and other expert evidence routinely admitted in trials every day.

Charles W. Daniels, *New Frontiers in Polygraph Evidence*, 25 THE NEW MEXICO TRIAL LAWYER 97, 107 (1997). The evidence has not dominated trials in New Mexico in any regard. In fact, it has been used only occasionally in either criminal or civil cases, although admissible in both. *Id.* at 105.

The long New Mexico experience with admissibility of unstipulated polygraph evidence, ignored by those who have relied on the theory of jury confusion, has been noted with approval by several national commentators who have studied the subject. "Ten years of experience there has failed to reveal any inherent problems with that type of evidence. In addition, there is no indication that polygraph testimony exerts excessive influence on triers of fact." David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 66. The "experience in the State of New Mexico is especially valuable," but it "has not been given the attention it merits in current reconsideration opinions." James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility*



After *Rock and Daubert*, 1996 U. ILL. L. REV. 363, 422, 417.

The *amicus* brief of the attorneys general refers to purported experiments with polygraph admissibility in four states which are said to have concluded that consideration of the evidence adversely affected the judicial system. There are several observations that should be made about the reality of what happened in those states.

First, all four of the states established a cumbersome procedure of admitting the evidence only upon stipulation, which assigned to the trial judge an additional role as factfinder to ensure protection of the defendant's constitutional rights and to make "a close and searching inquiry into the qualifications of the examiner, the fitness of the defendants for such examination, and the methods utilized in conducting the tests." *Commonwealth v. Mendes*, 406 Mass. 201, 206, 547 N.E.2d 35, 38 (1989). The courts found that the "stipulation simply cannot adequately deal with all situations which might arise affecting the accuracy of any particular test." *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). The stipulation approach is not only jurisprudentially unsound, it creates the very problems those courts faced.

Second, those pre-*Daubert* exclusion decisions relied on the old *Frye* test to base their central holdings primarily on the proposition that polygraph did not meet the reliability and acceptability standards of *Frye*.

Third, none of the cases cited any particular data or experience, other than the fact that there was a four-day hearing on one occasion in Massachusetts, to support the proposition that the polygraph consumed too much time or adversely effected juries. The cases simply cannot be relied upon to support the proposition that there is any real adverse effect on the fact-finder or the trial process. In fact, the Wisconsin court frankly acknowledged that it had "no

empirical data as to the effect of the [limiting] instruction or the influence of polygraph evidence on the conduct of trial or on the jury verdict." *State v. Dean*, 103 Wis. 2d 228, 276, 307 N.W.2d 628, 652 (1981).

The data easily could have been obtained, however. The attorney generals' brief failed to mention that the Wisconsin Crime Laboratory Bureau conducted a study of "the effect admission of polygraph evidence has had on the trial process" in Wisconsin during that time. Robert B. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 ABA JOURNAL 162 (1982). The findings of this government agency are significant: (1) polygraph evidence was used on an "infrequent" basis; (2) the polygraph evidence generally took less than two hours of trial time and never more than five hours; (3) the jurors proved to be "capable of weighing and evaluating all evidence and rendering verdicts that may be inconsistent with the polygraph evidence"; (4) "[p]olygraph examinations favor neither defense nor prosecution"; (5) "polygraph evidence is not disruptive of court proceedings" and (6) "polygraph does not assume undue influence in the evidentiary scheme." *Id.* at 164-65.

Not only is there no empirical or experimental evidence to support the apprehensions of adverse effect on individual juries or the jury trial process in general, both the experimental studies and the actual in-court experience with polygraphs point without contradiction to the contrary result. This potentially relevant and scientifically reliable evidence should not be excluded from the judicial fact-finding process by fear itself.



4. **The Blanket Evidentiary Exclusion of an Entire Field of Science is Jurisprudentially Unsound.**

This case squarely presents this Court with a blanket ban on potentially relevant and exculpatory evidence. It cannot be construed as a redefinition of the mental-state element of a particular offense, as could be done with the rule construed in *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), but instead applies across the board to all prosecutions for alleged violation of all substantive offenses. The rule essentially precludes a litigant from making a *Daubert* showing of relevance and reliability in the context of a particular case. It results not only in the negation of *Daubert*, it is also worse than the discredited *Frye* test, which at least kept the doors of the courthouse open to developments in scientific knowledge.

An affirmance of the court below does not require that the polygraph be admitted in any particular case, but simply would hold that the door cannot be closed to a court's consideration of this field of scientific learning in all cases. There are certainly occasional overriding policy interests, such as the protection of constitutional rights or the preservation of privileged relationships or Rule 403's recognition of the necessity for individual decisions in individual cases, that justify the exclusion of otherwise relevant and admissible evidence, but this blanket exclusion cannot be justified on any such principled grounds.

Rule 707 operates to impede the discovery of truth, based on unfounded and speculative apprehensions. As Justice Potter Stewart so ably observed many years ago, "[A]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (concurring). The mechanistic exclusionary rule at issue here impedes the doing of justice and the Court of Appeals was correct in so holding.

### CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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October Term, 1997

UNITED STATES OF AMERICA, *Petitioner,*

v.

EDWARD G. SCHEFFER, *Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals for the Armed Forces

**BRIEF AMICUS CURIAE OF UNITED STATES  
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION  
IN SUPPORT OF RESPONDENT**

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## QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of Airman Scheffer's right to present reliable and relevant evidence in his defense?



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## In The SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 96-1133

UNITED STATES OF AMERICA, *Petitioner*,

v.

EDWARD G. SCHEFFER, *Respondent*.

On Writ of Certiorari to the  
United States Court of Appeals for the Armed Forces

BRIEF *AMICUS CURIAE* OF UNITED STATES  
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION  
IN SUPPORT OF RESPONDENT

## INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division represents convicted Navy and Marine Corps servicemembers during the appellate review of their courts-martial. Moreover, *Amicus* acts as a de facto advocate for the Navy trial defense bar.

The Court of Appeals for the Armed Forces' decision in this case is binding on all courts-martial in the Navy and the Marine Corps. As a result, the Court's affirmance or reversal of the lower court's decision will directly impact the ability of Navy and Marine Corps servicemembers -- our



current and future clients -- to defend themselves at courts-martial.<sup>1</sup>

## SUMMARY OF THE ARGUMENT

The Court of Appeals for the Armed Forces is a specialized court that is well-equipped to address matters in military justice. It was created to protect the rights of servicemembers, while at the same ensuring military discipline. Unlike other federal courts, the lower court does not need to show deference to the decisions of the President in matters of military justice. It can evaluate the decisions of the President, as this Court evaluates a decision of a state court in constitutional law, because of its congressional mandate and its specialized knowledge.

In order to resolve the constitutional issue in this case, a court must undertake an analysis of the military's interests, as well as the constitutional principles. Since there is no court better than the lower court to analyze the military's interests in matters of military justice, the Court should show deference to the lower court's decision. The lower court's decision is reasonable in that it permits polygraph evidence only when the evidence is reliable and relevant, the necessary requirements for admissible evidence. Moreover, the court considered the President's interests, in reaching its decision.

Additionally, even under a *de novo* review, the lower court's decision is correct. The Compulsory Process Clause requires that legitimate government interests must justify the *per se* exclusion of exculpatory evidence. In this case, the President's interests do not justify this *per se* exclusion. All of the President's interests can be served by an application of the other military rules of evidence he has promulgated:

<sup>1</sup> As required by Rule 37 of the Court's rules, *Amicus* has filed both parties' consent to the filing of this brief with the Clerk.

Military Rules of Evidence 403 and 702. The military judge can, on a case-by-case basis, achieve the President's interests, while at the same time, permit an accused to defend himself at a court-martial with reliable and relevant evidence in his case.

## ARGUMENT

### I. THE COURT OF APPEALS FOR THE ARMED FORCES PROPERLY USED ITS EXPERTISE IN MILITARY JUSTICE.

#### A. Congress created the Court of Appeals for the Armed Forces to be a specialized court that would provide proper review of courts-martial.

Military courts-martial historically have had limited review. The court-martial itself gives a recommendation to the person who convened it. W. Winthrop, *Military Law and Precedents* 447 (1920 edition). The convening authority then must approve the sentence, or in other words, must officially accept and concur in the court-martial proceedings. *Id.* at 448. This has always been the first level of review. However, the ability to execute the sentence, i.e. to actually impose the sentence, has at times required further review.

Congress required that no sentence of a general court-martial could be executed until a report had been made to the general or commander-in-chief of the U.S. forces, or to Congress. American Articles of War 1776, § XIV, art. 8.<sup>2</sup> In 1786, for the first time, Congress required that certain courts-martial be reviewed by it: specifically, no sentence imposed on a general officer, or, in time of peace, no

<sup>2</sup> All of the following statutes in this paragraph are reprinted in Winthrop, *Military Law*.

sentence of death or dismissal<sup>3</sup>, could be executed until submitted to Congress. American Articles (of 1786), art. 2. Otherwise, the officer who convened the court-martial could execute the sentence. In 1806, Congress removed itself completely from this review and transferred its former role to the President. American Articles of War of 1806, art. 65. By 1874, the President maintained the same right to review a sentence before it could be executed. American Articles of War of 1874, art. 105, 106, 108. However, any death sentence or dismissal during time of war was now required to be submitted to the commanding general in the field, or commander of the department, before the sentence could be executed, instead of simply to the officer who convened the court-martial. Articles of War of 1874, art. 105, 107.

This system remained in effect until 1920. Then, the first military "appellate court" was created for the Army. Articles of War, ch. 227, 41 Stat. 787, 797-799 (1920). It was a board of review that consisted of three judge advocate officers. The board reviewed those cases in which the President was previously required to review before the sentence could be executed, as well as those cases from a general court-martial where the accused had been sentenced to death, dismissal, dishonorable discharge, or confinement in the penitentiary. *Id.* The board could, with the agreement of the Judge Advocate General, set aside the actions of the court-martial, and require a rehearing. If the Judge Advocate General disagreed with the board as to the proper resolution of the case, the matter was forwarded to the President for final decision. *Id.* If the board affirmed the findings and sentence, and the Judge Advocate General agreed, the sentence could then be executed. *Id.*

In 1948, the Judicial Council, consisting of three general officers, was created within the Army Judge Advocate General's office. This council was to act as

<sup>3</sup> A dismissal is the dishonorable discharge of an officer.

another level of review before a sentence could be executed. However, even under this statute, it appeared that if the Judge Advocate General disagreed with the decision of the Judicial Council, the President would make the final decision. Selective Service Act of 1948, ch. 625, § 226, 62 Stat. 604 (1948).

In the Navy, in 1800, general courts-martial could be executed by the authority convening them, unless the sentence was to death or dismissal. In the case of a sentence to death from a trial in the United States, or a sentence to a dismissal, presidential action was required; in the case of a sentence of death adjudged outside the United States, action by the commander of the fleet or squadron was required. Rules and Regulations for the Government of the Navy, ch. XXXIII, § 1, art. XLI, 2 Stat. 45, 51 (1800). Later, Congress required all death sentences to be executed by the President, but otherwise maintained the same level of review. Articles for the Government of the Navy, ch. CCIV, art. 19, 12 Stat. 600, 605 (1862). This would be the only review authorized in the Navy until the enactment of the Uniform Code of Military Justice. Revised Statutes 1873-1875, Title XV, ch. 10, § 1624, art. 53; H. Rep. No. 491, 81st Cong., 1st Sess. (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* at 64-76 (1950) (articles governing Navy before the Code).

There are two very important facts that are apparent from this history of court-martial review: first, there was never a review by an independent "court"; second, the review that did exist was always controlled by military officers or the President as the Commander-in-Chief.

Congress noted the defects, and attempted to correct them by enacting Article 67 of the Uniform Code of Military Justice. In introducing the Uniform Code of Military Justice to the House of Representatives, Congressman Brooks noted:



Article 67 contains the most revolutionary changes which have been incorporated into our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly matters involving military justice. Every Member of Congress, both present and past, is well aware of the validity of this statement.

95 Cong. Rec. 5718 (1949).

Article 67 created the Court of Military Appeals (now the Court of Appeals for the Armed Forces), which would consist of three (now five) civilian judges who would serve for fifteen years and could be removed only for cause. The court would be of limited jurisdiction reviewing only certain courts-martial. Congress had created a specialized court under its Article I authority to review courts-martial -- something which, in the prior history of military justice, had never existed. Congress "chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond*, 395 U.S. 683, 694 (1969).

Moreover, Congress had created a civilian judicial body whose decisions were binding and not subject to further review. Congress had removed the authority of final decision in courts-martial from the President and his subordinates, and instead placed it in an independent civilian court. For the first time, Congress had placed a civilian body (other than itself) above the decisions of the President in military justice matters. Presumably, Congress did so

because it was confident that the court would protect the balance between the servicemembers' rights and the military's need for discipline better than its predecessors (the President and the military) had for the previous 175 years.

**B. The Court of Appeals for the Armed Forces does not have to defer to the President in matters of military justice.**

The Court routinely shows deference to the actions of Congress in matters of military justice. *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality) (Congress entrusted with task of balancing rights of servicemembers and demands of discipline and duty); *Solorio v. United States*, 483 U.S. 435, 447 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military"). It has extended this preferential scope of review to those acting in military matters under the authority delegated by Congress. See *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (limited review of decisions of Air Force officials in matters of military uniform regulations). In this case, the Government complains that the lower court failed to show deference to the decision of the President in barring the use of polygraph evidence at courts-martial. Brief for the United States 39-43. *Amicus* asserts that the Court of Appeals for the Armed Forces does not have to show this deference to the President.

The Court reduces its scrutiny of Congress in matters of the military because the Constitution gives Congress "broad constitutional power to raise and regulate armies and navies." *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (citation omitted). Moreover, there is a practical reason as well. "[C]ourts are ill equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the



judiciary is trained to deal." E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962), cited in part in *Goldman*, 475 U.S. at 507. See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (it is difficult to conceive of an area of governmental activity in which the courts have less competence).

However, the Court of Appeals for the Armed Forces does not need to show special consideration to the military (even though this Court might) for two reasons. First, the lower court has been entrusted with the supervision of military justice by Congress under its constitutional authority to make rules for the regulations of the armed forces. Thus, the lower court was acting under the same authority of Congress as the President was, when he promulgated Military Rule of Evidence 707.<sup>4</sup> In fact, the history of appellate review makes clear that the lower court was created because the previous system was deficient. Congress entrusted military justice decisions to the lower court. As a result, there is no intrusion on Congress' constitutional powers in military matters when the lower court shows no deference to the decisions of the President.

Not only is there no constitutional bar to the lower

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<sup>4</sup> The President exercised his statutory authority to promulgate the rule of evidence. "The Congress shall have the power \* \* \* To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Congress exercised this authority by promulgating, among other rules, Article 36, Uniform Code of Military Justice, which permits trial procedures to be prescribed by the President. Whether the President has inherent authority to promulgate rules of evidence is not at issue in this case. See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Court did not address whether President had inherent authority to prescribe aggravating factors, when Congress had delegated this authority to him). Once Congress enacts a statute addressing his authority to issue rules, it has preempted any inherent rights the President may have. As a result, the President's resulting actions derive from congressional authority. *Id.*

court's stricter review, but also, the review conforms to congressional intent. The lower court, unlike every other federal court, was created as a specialized court in areas of military justice. In its forty-seven years of existence, dealing with thousands of courts-martial, year after year, it has gained a wealth of knowledge and expertise in areas of military justice. The Court of Appeals for the Armed Forces is "well-equipped" to address military matters on a parallel level with the President, unlike this and other federal courts. As a result, the lower court does not need to show special consideration to the President.

**C. Congress intended the Court of Appeals for the Armed Forces' decisions to have greater weight than the President's in issues of constitutional law that are intertwined with issues of military justice.**

The question as to the type of review that this Court should conduct in this case is complex. Normally, in areas of non-constitutional military justice, it is expected that the lower court would "remain the primary source of judicial authority under the Uniform Code of Military Justice." H. Rep. 98-459, 98th Cong., 1st Sess. 17 (1983), reprinted in 1983 U.S.C.C.A.N. 2177, 2182. It would be expected that the Court would not overrule the lower court on purely military justice matters "save in exceptional situations where egregious error has been committed." *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (citations omitted) (Court discusses scope of review for highest District of Columbia court, an article I court with direct review by the Supreme Court). See B. Boskey and E. Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329, 332-33 (1984) (in reviewing military justice, Court may follow model it established for District of Columbia Court of Appeals).

Naturally, however, when the Court reviews a lower court's decision on a constitutional issue, it reviews the decision *de novo*, because no court is more qualified to address constitutional issues than it. In fact, the Court has done so in every military case that has been directly reviewed by it. In *Solorio*, 483 U.S. 435, the Court revisited its own decision, and thus had no need to rely on a decision of the lower court. In *Davis v. United States*, 512 U.S. 452 (1994), and *Loving v. United States*, 116 S. Ct. 1737 (1996), there was no argument by the Government that a different rule applied in the military, and as a result, the Court was able to treat the issues as if they had arisen in a non-military context. Finally, *Weiss v. United States*, 510 U.S. 163 (1994), *Ryder v. United States*, 515 U.S. 177 (1995), and *Edmond v. United States*, 117 S. Ct. 1573 (1997), all involved the issue of the Appointments Clause, a provision that applies equally to the military. It is clear that "the expertise of military courts [had not] extended to the consideration of constitutional claims" in the above cases, *Noyd*, 395 U.S. at 696 n.8, and as a result, the Court reviewed the military court's decisions as it would have reviewed other court's decisions.

This case, however, is different. *Amicus* asserts the issue in this case is a "hybrid" constitutional issue. On the one hand, the issue is a constitutional one because the lower court based its decision on the Compulsory Process Clause of the Sixth Amendment. In resolving this type of issue, the Court has examined the interests of the State and whether those interests justify the exclusion. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Montana v. Eglehoff*, 116 S. Ct. 2013, 2029 (1996) (O'Connor, J. dissenting). On the other hand, in order for this Court to determine whether the President's interests justify the exclusion, it must examine the interests and his justification for the rule in a military context. This is a task which the Court is ill-equipped to perform -- it does not have the knowledge to know if the

President is correct because of the intricacies of military discipline and courts-martial. However, this is a task well-suited for the Court of Appeals for the Armed Forces, and no court would have more expertise in this area.

When addressing whether due process required counsel at a summary court-martial, after the Court of Military Appeals had found such a requirement, the Court noted that "[d]ealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). This was so, even though the issue was a constitutional one. As the Court implicitly recognized, the constitutional issue in *Middendorf* was interwoven with the military's interests, and as a result, the lower court's decision was important. The Court could not determine whether a summary court-martial required counsel without first determining what effects supplying counsel would have on the military interests. In that case, however, the Court did not rely on the Court of Military Appeals' decision, because only two judges (at the time the court was composed of three judges) addressed the claim of military necessity and their responses conflicted. *Id.* at 44. In this case, however, the majority of three judges rejected the claim of military necessity. Moreover, Judge Sullivan, dissented below because he believed that the evidence was not relevant -- and not because military necessity required the exclusion of it. *United States v. Williams*, 43 M.J. 348, 356-57 (1995) (Sullivan, C.J., concurring). Thus, this case involves an appropriate constitutional issue in which the Court should show deference to the lower court's judgment.

Practically, the question then becomes how does the Court show special consideration both to the decision of the President in promulgating this rule under his delegated authority from Congress, and to the lower court in striking down the rule under its delegated authority as the supervisor of military justice. This is the problem that was avoided in



*Middendorf*, but is present in this case.

*Amicus* proposes that this Court rely on the lower court's judgment instead of the President's because this would comply with congressional intent. As noted above, historically, the President was responsible for military justice, with no review other than through him. Winthrop, *Military Law* 53 (historically the only appeal was through the President or other superior executive authority). Congress, in creating the lower court, superseded the President's and military's ability to review courts-martial. This was a conscious congressional decision to take power from one group -- the President and his military officers<sup>5</sup> -- and give it to a new group -- the Court of Appeals for the Armed Forces. The lower court was to protect an accused's rights and ensure a fair court-martial process. In a case such as this, where the lower court has made an effort to protect a military servicemember's right to defend himself, the lower court's view should carry more weight with the Court than the President's.

Finally, this reliance on the lower court's decision does not eviscerate Congress' intent in making the lower court's decisions subject to direct review by the Court. The Court does not "abdicate [its] ultimate responsibility to decide the constitutional question" by doing so, but instead recognizes that Congress itself requires such deference to the lower court's actions. *Rostker*, 453 U.S. at 67.

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<sup>5</sup> Congress did leave some further mitigating power in the other officers. Article 73, U.C.M.J. (Judge Advocate General may grant new trial under some circumstances); Article 74, U.C.M.J. (service Secretary may suspend or remit unexecuted portions of sentence). Obviously, the President maintains his constitutional authority to pardon.

**D. The Court of Appeals for the Armed Forces' decision was reasonable, despite the President's *per se* exclusion of exculpatory evidence.**

Even under this scope of review, the Court must examine whether the decision of the lower court was reasonable. It was. The court realized that all of the President's concerns in excluding this evidence would be met by military judges and military court-martial members. Its knowledge and confidence in the court-martial parties should be affirmed.

**1. The lower court carefully considered this decision.**

The lower court had considered the admissibility of polygraph evidence for almost ten years before it issued the decision in this case. In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), the court first announced that polygraph evidence might be admissible at courts-martial, if a proper foundation for the evidence could be laid. In 1991, in response to the *Gipson* decision, the President promulgated Military Rule of Evidence 707. Two years later, the court noted the possible constitutional defects in the rule. *United States v. Rodriguez*, 37 M.J. 448, 451-52 n.2 (C.M.A. 1993) (opinion of Wiss, J.). Two years after that, it overruled the Army appellate court's decision holding the President's rule unconstitutional, because the polygraph evidence was not relevant when the accused did not testify. *United States v. Williams*, 43 M.J. 348 (1995). Finally, in this case, the court struck down the rule, if the evidence would be admissible under the standards for other scientific evidence. The lower court showed no haste in striking the President's rule, but instead, did so only after a careful consideration of the issue.



2. The lower court ensured that the evidence is relevant and reliable.

Second, the court permits this evidence only if it is relevant and reliable in this case -- the basic principles of admissibility for all evidence. An accused must testify, and his credibility must be attacked, before exculpatory polygraph evidence may be admitted. The polygraph examiner can only testify that the accused's prior responses to certain questions showed no deception. The relevancy of this evidence is consistent with other types of evidence that are routinely admitted against an accused. *United States v. Cacy*, 43 M.J. 214, 218 (1995) (no error to permit expert to testify that victim's accusation did not appear rehearsed); *United States v. Suarez*, 35 M.J. 374, 376 (C.M.A. 1992) (expert permitted to testify that counter-intuitive conduct not necessarily inconsistent with truthful accusation).

Additionally, the lower court permits the evidence only if it meets the standards of admissibility for other types of scientific evidence. This ensures a consistent response to this and other scientific evidence in military courts-martial. The lower court has not lessened the standard of reliability for polygraph evidence, but instead allows an accused to establish that his evidence is in fact reliable. If the evidence is not reliable, it will not be admitted. This is a reasonable response to this issue, balancing an accused's right to present a defense and the President's interests in only permitting reliable evidence before courts-martial.

3. The lower court considered the President's interests in excluding the evidence.

Finally, the court did not blindly ignore the President's interests in this case. Judge Gierke (with Chief Judge Cox and former Chief Judge Everett concurring) acknowledged the President's interests, but also noted that

the argument was speculative at this point, and that the military did not appear to suffer any consequences after the *Gipson* decision (after which, polygraph evidence was no longer *per se* inadmissible for four years). Finally, and most important, speaking as the court that was created to ensure the rights of servicemembers, it stated that "our measure should be the scales of justice, not the cash register." The Court of Appeals for the Armed Forces' decision was a proper and reasonable one. In striking the provision, the court accomplished what Congress intended for it to do -- use its specialized knowledge to supervise military justice. As a result, its decision should be affirmed.

## II. A *PER SE* EXCLUSION OF POLYGRAPH EVIDENCE VIOLATES THE SIXTH AMENDMENT.<sup>6</sup>

If this Court reviews this constitutional issue under the same standard of review it would had the case arose from a state or federal court, *Amicus* asserts nonetheless that the President's rule is unconstitutional.

### A. Legitimate government interests must justify the *per se* exclusion of exculpatory evidence.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This guarantee is protected, in part, by the Compulsory Process Clause of the Sixth Amendment. The clause provides "[t]he right to offer testimony of witnesses, and to compel their attendance, if necessary," in order to "present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

On several occasions, the Court has ruled on whether a State's *per se* exclusion of evidence violates this right to present a defense. While the Court has never announced a single test to determine whether the exclusion violates the Compulsory Process Clause, *Amicus* asserts that one can be

<sup>6</sup> While the Court has never held that the Sixth Amendment applies to the military, *Davis*, 512 U.S. at 457 n.4, neither the Government nor the dissenters below challenged its application. See *United States v. Williams*, 43 M.J. 348, 356 (1995) (Sullivan, C.J., concurring) (Sixth Amendment applies to the military; however polygraph evidence not relevant).

distilled from its decisions<sup>7</sup>:

Legitimate government interests must justify the *per se* exclusion of exculpatory evidence.

*Crane*, 476 U.S. at 690. If the interests do not, then the exclusion is unconstitutional.

The reviewing court must make a "close examination" of the issue. *Montana v. Eglehoff*, 116 S. Ct. 2013, 2029 (1996) (O'Connor, J. dissenting) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)<sup>8</sup>). While this term in the context of the Sixth Amendment has never been precisely defined, the same term has been used to describe the level of scrutiny for a race-based classification or an intrusion into the family relationship by the legislature. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion); *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 564 (1996). Thus, the Court must not

<sup>7</sup> Some of the cases were decided on the basis of the Due Process Clause instead of the Compulsory Clause. *Amicus* contends that the provisions provide the identical protection in this area of law. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (Court concluded that compulsory process provided no greater protection than due process, and avoided deciding whether the protections differ).

<sup>8</sup> *Chambers* addressed both the Confrontation Clause and Compulsory Process Clause. While the quoted language from *Chambers* arose from the discussion of the Confrontation Clause, the Court later closely examined the State's interests in addressing the Compulsory Process Clause issue as well. See also Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 628 (1978) ("whatever the balance is struck between the interests of the defendant and the interest of the state, the outcome should be identical whether the accused's sixth amendment claim arises in the context of his right to be confronted with the witnesses against him or his right to obtain witnesses in his favor").

determine whether the President's decision was reasonable<sup>9</sup>, but instead whether it was necessary to serve his interests.

There must be a legitimate government interest in excluding the evidence. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers*, 410 U.S. at 295. See also *Eglehoff*, 116 S. Ct. at 2029 (O'Connor, dissenting) (State does not have legitimate interest in promulgating rule of evidence in order to alleviate its burden of proof). Finally, this interest must justify the exclusion of the evidence. *Lucas*, 500 U.S. at 151; *Crane*, 476 U.S. at 691 (State offered no rational justification for exclusion of evidence concerning circumstances surrounding the taking of a confession).

**B. The drafter's interests do not justify this *per se* exclusion of evidence.**

The drafters of Military Rule of Evidence 707 offer several interests as a basis for the exclusion of polygraph evidence: First, the court members will be misled by polygraph evidence and accept the evidence as unimpeachable or conclusive. Analysis of Military Rule of Evidence 707 at A22-48, Manual for Courts-Martial (1995 edition). Second, there will be a danger of confusion of the issues, where the members will focus more on determining the validity of the test rather than the guilt or innocence of an accused. *Id.* Third, polygraph evidence will result in a waste of time because the reliability of the test and the qualifications of an expert must be litigated in each case. *Id.* Fourth, the reliability of the test has not been sufficiently established. *Id.* While these interests may be valid, they do

<sup>9</sup> Despite the Government's argument to the contrary, the standard of review to be applied is strict. Brief for the United States at 35 ("rule *rationally* serves valid interests") (emphasis added).

not justify the *per se* rule.<sup>10</sup>

1. Court-martial members are better qualified than ordinary jurors, and, as a result, will not be misled by polygraph evidence.

In the military, the convening authority (the officer who creates, and sends specific charges to, a court-martial) selects the members for a court-martial. The convening authority is required to select those servicemembers who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25, Uniform Code of Military Justice.<sup>11</sup> This requirement "ensures that the 'asserted vagaries of juries' found in other criminal justice systems are minimized in the military." *United States v. Carter*, 22 M.J. 771, 776 (A.C.M.R. 1986) (limiting instruction in regard to rape trauma syndrome evidence prevented members from

<sup>10</sup> The President has given no indication that he was concerned with polygraph evidence intruding on the member's function of assessing credibility. Analysis to Rule 707, notwithstanding the Government's assertion. Brief for the United States at 17, 27-29. In fact, the President permits several types of evidence to assist in a member's credibility determination: Military Rule of Evidence 608(a) (character for truthfulness admissible in order to attack or support credibility); Rule 608(c) (evidence of bias, prejudice, or motive to misrepresent admissible); Rule 609 (prior felony convictions or convictions involving dishonesty admissible). In the one area of credibility in which he has issued a *per se* rule, Rule 610 (exclusion of religious belief), the drafter's analysis acknowledges that this exclusion may be overcome when critical to the defense. Analysis of the Military Rule of Evidence 610, Manual for Courts-Martial (1995 edition).

<sup>11</sup> When the convening authority selects officer members, as was done in this case, virtually every member will also have a college degree and many will have a postgraduate degree. Moreover, typically, several of the members will have several years of military service.



being overly impressed with expert) (quoting *Schick v. Reed*, 419 U.S. 256, 260 (1974)), *aff'd*, 26 M.J. 428 (1988).

The military rules of evidence themselves acknowledge this superior ability of court-martial members to receive evidence. In contrast to the federal system, there is no military counterpart to Federal Rule of Evidence 704(b)<sup>12</sup>. Court-martial members may hear direct and explicit expert testimony on whether the elements have been met or an offense has occurred. This is because, according to the drafters, the qualifications of the court-martial members reduce the risk that they will be unduly influenced by this evidence, as opposed to civilian jurors. Analysis to Military Rule of Evidence 704, Manual for Courts-Martial (1995 edition).

Every servicemember from his or her initial training is taught to follow and obey orders. This obedience to orders also applies to following a military judge's instructions. *United States v. Hardy*, 46 M.J. 67, 74 (1997) (military personnel are trained to obey the law, including the military judge's instructions, and accept their responsibility to follow those instructions, regardless of their personal beliefs). As a result, there is no justification for this *per se* exclusion of evidence in order to ensure that court-martial members will not be misled. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)). This is especially true for court-martial members.

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<sup>12</sup> "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

2. There is no danger from a confusion of the issues or waste of time, because, if necessary, the military judge already possesses the ability to exclude the evidence.

The drafters were concerned with two polygraph experts testifying against each other about two separately conducted polygraph exams with different results at a court-martial. Additionally, the drafters were concerned with the possibility that it would be time-consuming to determine the reliability of the test and examiner in each case. Even if these are legitimate concerns,<sup>13</sup> this rule is unnecessary. The military judge may exclude relevant evidence when its probative value is substantially outweighed by the danger of confusion of issues or by the considerations of time. Military Rule of Evidence 403. This authority protects the court-martial from "degenerating into a trial of the polygraph machine" and from a waste of time, as feared by the drafters. As a result, the concerns do not justify this rule.

Moreover, in this case, this fear was unwarranted. The polygraph examination was done by the Air Force Office of Special Intelligence [AFOSI]. The prosecution would not need to have another examination done, because their agents, AFOSI, had already completed it. This trial would have consisted of only one polygraph examiner with one set of results, under direct and cross-examination. In this case, there would have been no danger of confusion or a waste of time, and as a result, there is no reason to prohibit Airman Scheffer from presenting his defense in this case.

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<sup>13</sup> *Amicus* does not know of a case in which the Government was prohibited from admitting scientific evidence because it would take too long, or because the defense would then offer its own expert on the scientific evidence.

3. The scientific reliability of the polygraph should be addressed by the trial judge.

As noted by the Government, there is a debate over the scientific reliability of polygraph examinations. Brief for the United States at 18-25. There is a valid governmental interest in excluding unreliable evidence; however, a *per se* exclusion is unnecessary to satisfy this interest for three reasons. See *Rock*, 483 U.S. at 61 (a government's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case").

First, Military Rule of Evidence 702 permits scientific evidence to be admitted only if it meets a standard of reliability. *United States v. Nimmer*, 43 M.J. 252 (1995) (in addressing the admissibility of hair analysis to determine drug use, court follows *Daubert* and its requirement of reliability). The military judge is very capable of addressing the reliability of the evidence and making a decision as to its admissibility without the use of the President's *per se* rule of exclusion. Naturally, if he is qualified to rule on the admissibility of other, novel scientific evidence, he clearly is able to rule on evidence upon which there is a large body of law and science. See *United States v. Youngberg*, 43 M.J. 379 (1995) (judge properly admitted DNA evidence even though it was an issue of first impression for the court).

Second, this evidence was taken, in essence, under the authority of the President. The President approves of the polygraph program. The investigative agent who conducted this examination ultimately works for the President, and in conducting the examination he did so under procedures authorized by the Secretary of Defense -- a member of the President's cabinet. Military Rule of Evidence 707 itself, in subsection (b) -- which states that the rule does not bar otherwise admissible statements made during the polygraph examination -- implicitly expects polygraphs to be continued

to be used and to provide helpful information to the government. If the President were truly concerned with the reliability of these examinations, he would not allow its use as extensively as he does. His concerns of reliability are disingenuous and should not hinder Airman Scheffer's right to defend himself.

Finally, this type of evidence, as is true for most types of scientific evidence, is in a constant state of improvement. In 1995, the Director of the Defense Polygraph Institute noted: "The period between 1986 and the present has been one of unparalleled advances in the psychophysiological detection of deception testing procedures and processes." Yankee, *The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception*, 40 J. Forensic Sci. 63, 63 (1995), cited in 1 P. Giannelli & E. Immwinkelried, *Scientific Evidence* § 8-2(C) (1996 supp.). Moreover, the President's own officers acknowledge that it can assist in the defense of servicemembers. The 1995 Department of Defense Report to Congress indicated that "[t]he polygraph examination process was [] valuable in helping to establish the innocence of persons charged with serious infractions." Department of Defense Polygraph Program, *Annual Polygraph Report to Congress, Fiscal Year 1995*. The President's rule forecloses the ability for later admission of the evidence despite the advances that may occur. This *per se* exclusion -- when it has not been shown that all polygraph evidence is unreliable -- is too broad to justify the governmental interests in this case.

**CONCLUSION**

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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August 1997



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No. 96-1133

Supreme Court, U.S.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER, RESPONDENT

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES*

**BRIEF OF THE UNITED STATES ARMY  
DEFENSE APPELLATE DIVISION,  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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54 pp

### **QUESTION PRESENTED**

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996

No. 96-1133

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER, RESPONDENT

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

BRIEF OF THE UNITED STATES ARMY  
DEFENSE APPELLATE DIVISION,  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE<sup>1</sup>

The United States Army Defense Appellate Division is an agency of the United States Army Judge Advocate General's Corps. The Defense Appellate Division represents individual soldiers on appeal before the United States Army Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, and the United States Supreme Court.

The Defense Appellate Division represents all soldiers who receive either a punitive discharge or at least one year of confinement as a result of an Army court-martial. In 1996, the Division filed approximately 780 appellate pleadings with the Army Court of Criminal Appeals and nearly 400 pleadings with the Court of Appeals for the Armed Forces.

The Military Rules of Evidence, which are at issue in the case *sub judice*, apply to all Army courts-martial. Furthermore, Army judge advocates fre-

<sup>1</sup> Each party has given its consent, in writing, to the filing of this brief amicus curiae. Letters indicating such consent have been filed with the Clerk of the Court.

quently encounter polygraph issues in their practice. The Air Force Defense Appellate Division, representing the respondent, requested an amicus brief regarding the current status of polygraph admissibility among the many jurisdictions potentially affected by this decision. Given the authors' professional knowledge of the subject matter and the impact of this Court's decision on soldiers facing courts-martial, this amicus curiae brief represents the competent and informed viewpoint of a party with a legitimate interest in the outcome of this case.

### SUMMARY OF ARGUMENT

The "general acceptance" test was the first measure by which polygraphs and scientific evidence were evaluated prior to admission in a trial. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In the wake of *Frye*, the vast majority of jurisdictions held polygraph evidence inadmissible *per se*. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), this Court rejected the *Frye* test and provided a non-exclusive list of factors as part of a less-stringent test designed to ensure that the factfinder is presented with scientific knowledge which will assist it to understand or determine a fact in issue. The federal and state jurisdictions, with the exception of the military appellate courts, have failed to fully consider the Sixth Amendment implications of *per se* exclusions of defense proffered polygraphs.

In the post-*Daubert* period, several federal circuits have recognized that polygraph evidence has advanced in reliability as the technology evolved and will admit stipulated results into evidence. *E.g.*, *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc). The majority of state and federal courts continue to exclude polygraphs regardless of whether *Daubert* or *Frye* is applied to the admissibility question. *See generally State v. Dean*, 307 N.W.2d 628 (Wis. 1981); *State v. Jones*, 446 S.E.2d 696 (N.C. 1996); *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975). The jurisdictions which admit polygraph expertise require a stipulation, *see State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc) and *Piccinonna*, with the exception of New Mexico, which has admitted polygraphs through a combination of case law and judicial promulgation of rules of evidence. *See State v. Dorsey*, 539 P.2d 204 (N.M. 1975) (held that polygraphs are admissible if the operator is qualified, the testing procedures were reliable, and the test of the particular subject was valid); N.M. Stat. Ann. § 11-707 (Michie 1993).

Although the military is a "specialized society separate from civilian society," the burden is on the Government to justify the denial of constitutional protections. *See, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). Polygraph evidence is not beyond the comprehension of military

courts given the admission of other types of far more problematic scientific evidence. The Government has failed to demonstrate that servicemembers are not entitled to present a defense, specifically exculpatory polygraphs.

This Court has yet to consider the impact that the Sixth Amendment will have on Federal Rule of Evidence 702<sup>2</sup> given the limited scope of *Daubert*'s civil law focus. The Court has applied the Sixth Amendment where necessary to protect due process rights. *See Washington v. Texas*, 388 U.S. 14 (1967) (state statute concerning incompetency of codefendants invalid); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (state hearsay rule compromises an accused's right to call witnesses); *Rock v. Arkansas*, 483 U.S. 44 (1987) (*per se* exclusion of evidence unconstitutional despite state's legitimate interest in barring unreliable evidence). Military Rule of Evidence 707 excludes polygraphs *per se* and therefore violates Airman Scheffer's due process rights given the rule's categorical exclusion.

This Court is at a critical juncture, one where scientific expertise collides head-on with the Sixth Amendment. The Court should recognize the accused's right to lay a foundation for the presentment of exculpatory polygraph evidence at trial. To that end, the amicus offer a proposed preliminary due process *Daubert* factor for trial judges to apply in criminal cases:

The defense will be granted the opportunity to lay a foundation for the presentment of science-based expert evidence under a *Daubert*/Rule 403 analysis where the proffered evidence is relevant to a constitutional right of the accused. Admission of such proffered expertise is presumed in cases affecting a valid constitutional right and where the defense demonstrates the reliability of the technique.

The proposed due process factor would operate to allow the respondent an opportunity to lay a foundation toward the admission of exculpatory polygraphs, a scientifically-based technique. Admission of the results in the case *sub judice* would be presumed given the reliability of this polygraph, performed at the behest of a Government law enforcement agency. In conclusion, Airman Scheffer's Sixth Amendment right to present a defense cannot be eviscerated by a mechanical *per se* exclusionary rule of evidence, and the trial judge should have been able to consider whether the polygraph herein was reliable.

<sup>2</sup> Federal Rule of Evidence 702 and Military Rule of Evidence 702 are identical. [Hereinafter, both rules will be referred to collectively as Rule 702.]



## ARGUMENT

### I. *DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.*, COMPELS CRIMINAL COURTS TO CONSIDER ADMISSION OF POLYGRAPH EVIDENCE

Polygraph expertise, the pariah of scientific evidence, has long been the bane of criminal courts since 1923, when the "general acceptance" test was adopted as a significant admissibility hurdle for proponents of scientific evidence. *Frye*, 293 F. 1013 (D.C. Cir. 1923). Under the anachronistic assumption of the polygraph's failure to be generally accepted in the scientific community, most jurisdictions have treated this evidence with outright contempt.<sup>3</sup> Since *Frye*, many courts and commentators have ignored significant advances in the field, preferring to liken polygraph expertise to the chance associated with a coin flip.<sup>4</sup>

The rules regarding expert evidence radically changed with this Court's opinion in *Daubert*, when this Court rejected the *Frye* test in favor of a less stringent test to ensure that the factfinder is presented with scientific knowledge which will assist it to understand or determine a fact in issue.<sup>5</sup> The federal courts could no longer reflexively disregard polygraph evidence because it was not generally accepted in the scientific community. Yet, the roadblocks for polygraph evidence remain entrenched despite the plethora of other judicially acceptable expert fields.<sup>6</sup> Scientific acceptance aside, the federal and state

<sup>3</sup> *Peterson v. State*, 247 S.W.2d 110 (Tex. Crim. App. 1951); *Lee v. Commonwealth*, 105 S.E.2d 152 (Va. 1952); see also section II, *infra*.

<sup>4</sup> See generally *Commonwealth v. Mendes*, 574 N.E.2d 35, 39 (Mass. 1989) (citing D. Lykken, *The Lie Detector and the Law*, 8 Crim. Def. 19, 26 (1981)); see also *Britton v. Farmers Ins. Group*, 721 P.2d 303, 314 (Mont. 1986) (judge denied polygraph evidence after expert, Dr. Lykken, testified that "polygraph results have 'zero probative value' and that allowing polygraph evidence in the courtroom would be on a par to allowing testimony of astrologers and fortune tellers"); and W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," 1 *Modern Scientific Evidence* (D. Faigman et al. eds., 1997).

<sup>5</sup> "Many factors will bear on the inquiry and we do not presume to set out a definitive checklist or test" to include: whether the theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error, and whether it has been generally accepted within the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

<sup>6</sup> Other expert evidence of controversial scientific reliability has been accepted by the courts. See, e.g., *United States v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996) (no abuse of discretion for admission of psychological evidence of child abuse); *White v. Ieyoub*, 25 F.3d 245 (5th Cir. 1994) (upholding the admission of post-hypnotic identification by victim); *United States v. Houser*, 36 M.J. 392, 399 (C.M.A. 1993) (permitting testimony

jurisdictions, with the exception of the military appellate courts, have failed to consider the Sixth Amendment implications in *per se* exclusions of defense proffered polygraphs.

In 1987, the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces [hereinafter Armed Forces court]) recognized the scientific validity of polygraphy in *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), *superseded by* Mil. R. Evid. 707. This landmark decision included language noting the "state of polygraph techniques is such that . . . results of a particular examination may be as good or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials." *Id.* at 253. As the facts demonstrated, *Gipson*, like most polygraph cases, involved disagreement between prosecution and defense experts as to the results but not to the underlying scientific foundation.<sup>7</sup> The insightful *Gipson* court concluded, well in advance of *Daubert*, that the *Frye* standard of expert admissibility had been "superseded and 'should be rejected as an independent controlling standard of admissibility.'" *Id.* at 251 (quoting *United States v. Downing*, 753 F.2d 1224, 1233-37 (3d Cir. 1985)). The oft-repeated argument that polygraphy is not generally accepted within the scientific community fell on deaf ears at the Armed Forces court given the advances in the field since the 1923 *Frye* decision.

#### A. A substantial number of jurisdictions admit polygraph expertise without regard for the defendant's Sixth Amendment right to present a defense

While the majority of jurisdictions have held polygraphs inadmissible, many state and federal courts have applied a stipulation requirement in admitting such evidence. The jurisdictions utilizing stipulations often apply other requirements such as written agreements, judicial discretion, and special jury instructions. Those courts which agree to stipulated results cannot now logically complain about any alleged unduly prejudicial impact on the jury's delib-

regarding the "typical" symptoms of rape trauma syndrome by expert who had not examined the victim in the case); *United States v. Antone*, 981 F.2d 1059 (9th Cir. 1992) (permitting child sexual-abuse expert testimony); *Arcoren v. United States*, 929 F.2d 1235, 1239-41 (8th Cir. 1991) (permitting evidence of battered woman syndrome).

<sup>7</sup> Both the defense and prosecution, which had offered to stipulate to the defense polygrapher's expertise, conducted polygraphs on the accused resulting in different conclusions. *Gipson*, 24 M.J. at 247.



erations.<sup>8</sup> At the forefront of the polygraph issue stands New Mexico with a comprehensive statutory scheme regarding admission. No federal or state case law expressly recognizes the Sixth Amendment rights at stake in the case at bar.

### 1. Several federal circuits currently accept polygraphs

Prior to the Supreme Court's decision in *Daubert*, the federal circuits generally adhered to the traditional approach of *per se* inadmissibility of polygraph evidence. *E.g.*, *United States v. Bortnovsky*, 879 F.2d 30, 35 (2d Cir. 1989).<sup>9</sup> Despite general hostility toward polygraph evidence, however, some federal courts did allow the introduction of such evidence when it was admitted to prove a fact other than truthfulness. *E.g.*, *United States v. Kampiles*, 609 F.2d 1233, 1244-45 (7th Cir. 1979) (admissible to rebut assertion of coerced confession).<sup>10</sup> In the 1980's, some federal circuits also recognized that polygraph results could be accepted into evidence when the parties stipulated to admissibility. *E.g.*, *Piccinonna*, 885 F.2d 1529.<sup>11</sup>

<sup>8</sup> Petitioner asserts that polygraph evidence intrudes on the functions performed by the trier of fact because it is "shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi." See Petitioner's Brief at 26 (quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)). However, "[o]ne fear we [in the military justice system] do not have is that factfinders will be overwhelmed by polygraph testimony. The concern commonly expressed in that regard is that factfinders will place undue reliance on the myth of scientific infallibility, thereby deferring their historic function to the experts. A number of recent studies refute that contention, and their authors conclude that juries generally are capable of evaluating polygraph evidence and giving it due weight." *Gipson*, 24 M.J. at 253, n.11.

<sup>9</sup> See also *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987); *United States v. Brevard*, 739 F.2d 180, 182 (4th Cir. 1984); *United States v. Fife*, 573 F.2d 369 (6th Cir. 1976); *United States v. Skeens*, 494 F.2d 1050 (D.C. Cir. 1974); *United States v. Frogge*, 476 F.2d 969, 970 (5th Cir. 1973).

<sup>10</sup> See also *Underwood v. Colonial Penn. Ins. Co.*, 888 F.2d 588 (8th Cir. 1989) (admissible to show motive, plan, scheme or design under Rule of Evidence 404(b)); *United States v. Miller*, 874 F.2d 1255, 1261 (9th Cir. 1989); *United States v. Lynn*, 856 F.2d 430, 432-33 (1st Cir. 1988) (terms of accomplice-witness' plea agreement, including requirement of polygraph test, admissible to show motive to fabricate); *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987) (admissible to rebut assertion of coerced confession); *United States v. Hall*, 805 F.2d 1410, 1416 (10th Cir. 1986) (admissible to explain why police did not conduct more thorough investigation); *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984); *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951) (admissible to rebut assertion of coerced confession).

<sup>11</sup> See also *Wolfel v. Holbrook*, 823 F.2d 970, 972 (6th Cir. 1987); *Brown v. Darcy*, 783 F.2d 1389, 1396 n.13 (9th Cir. 1986); *Alexander*, 526 F.2d at 166.

Noting tremendous advances in polygraph instrumentation and technique, the Eleventh Circuit became the first in the federal system to prescribe an approach to allow the admission of polygraph testimony. In *Piccinonna*, the Eleventh Circuit outlined two instances where polygraph evidence may be admitted at trial. *Id.* at 1536. First, polygraph evidence is admissible when both parties stipulate in advance as to the circumstances of the test and the scope of its admissibility. *Id.* Second, polygraph evidence may be admitted to impeach or corroborate the testimony of a witness at trial. *Id.* If the second approach is used, the offering party must provide adequate notice to the opposing party, as well as reasonable opportunity to have its own polygraph expert administer a test covering substantially the same questions. *Id.* In addition, the admissibility of corroboration or impeachment testimony is governed by the Federal Rules of Evidence. For example, evidence that a witness passed a polygraph examination, used to corroborate that witness' in-court testimony, would not be admissible under Rule 608 unless and until the credibility of that witness has been attacked. *Id.* Even if these conditions are met, trial courts retain the discretion to exclude polygraph evidence on other grounds under the Federal Rules of Evidence, such as Rules 401 and 403. *Id.*

The first federal court of appeals to reconsider the admissibility of polygraph evidence in light of *Daubert* was the Fifth Circuit, in *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995). In *Posado*, the trial court refused to consider the admissibility of polygraph results offered by the defendants to prove that they were truthful when they denied consenting to a police search of their luggage. *Id.* at 431. The Fifth Circuit determined that a *per se* rule against polygraph evidence was incompatible with *Daubert*. *Id.* at 434. The Court proposed no other rule in its place, but rather authorized district courts to conduct reliability assessments of polygraph evidence. *Id.* at 432-34. *Posado* did emphasize, however, that Federal Rule 403 would play "an enhanced role" in connection with the admission of any novel scientific evidence, including polygraph results. *Id.* at 435-36 (noting that procedures followed by defendants reduced the possibility of unfair prejudice and increased reliability).<sup>12</sup>

Like the Fifth Circuit, other federal courts also have recognized that while

<sup>12</sup> After *Posado*, the Fifth Circuit again examined a district court's exclusion of polygraph evidence in *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996). The Court held that the district court did not need to evaluate the scientific validity of the evidence under *Daubert* because the evidence could be excluded on other grounds. *Id.* at 1515 (defendant's offer failed to show evidence would assist the trier of fact to understand the evidence or determine a fact in issue).

*Daubert* invalidated the *Frye* test, it did not preclude other rules from excluding polygraph evidence. *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1996) (recognizing that trial judge should evaluate admission under Rule 403); *United States v. Kwong*, 69 F.3d 663, 668-69 (2d Cir. 1995) (evidence excluded under Rule 403 because test questions were inherently ambiguous); *United States v. Sherlin*, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (evidence excluded under Rule 403 where opposing party unaware of test until after its completion); *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (evidence excluded because polygraph results were peripheral to the "core issues" of the case and proponent was otherwise able to successfully impeach witness); *Conti v. Commissioner*, 39 F.3d 658, 662 (6th Cir. 1994) (evidence excluded under Rule 403 because evidence was "unilaterally obtained").

## 2. New Mexico's comprehensive scheme for admission of polygraph evidence is a model for all jurisdictions to emulate

With its opinion in *State v. Dorsey*, 539 P.2d 204 (N.M. 1975), the Supreme Court of New Mexico initiated the only sustained period of general admission of polygraph results in any United States jurisdiction. In *Dorsey*, the New Mexico Supreme Court held that polygraph results are admissible if (1) the operator is qualified, (2) the testing procedures were reliable, and (3) the test of the particular subject was valid. *Id.* at 205.

In 1983, the Supreme Court of New Mexico promulgated New Mexico Rule of Evidence 11-707, establishing a comprehensive scheme for admitting polygraph evidence.<sup>13</sup> N.M. Stat. Ann. § 11-707 (Michie 1993).<sup>14</sup> In *State v. Sanders*, 872 P.2d 870 (N.M. 1994), the New Mexico Supreme Court held that

<sup>13</sup> New Mexico adopted Federal Rule of Evidence 702. N.M. Stat. Ann. § 11-702 (Michie 1993). New Mexico utilizes *Daubert* in determining admissibility of non-polygraph scientific evidence. *State v. Alberico*, 861 P.2d 192 (N.M. 1994).

<sup>14</sup> Currently, Rule 11-707 governs admissibility. *State v. Baca*, 902 P.2d 65, 70 (N.M. 1995). Rule 11-707 permits admission of polygraph evidence as to the truthfulness of any person called as a witness, provided that certain reliability requirements are met. N.M. Stat. Ann. § 11-707(c). The examination must be conducted by a qualified examiner who has at least five years experience administering or interpreting examinations or equivalent academic training, as well as at least twenty hours of continuing education during the twelve months prior to the examination offered in evidence. N.M. Stat. Ann. § 11-707(b). The examination must include at least two relevant questions, at least three charts and be quantitatively scored. N.M. Stat. Ann. § 11-707(c). The pretest interview and actual testing must be recorded on an audio or video recording device. N.M. Stat. Ann. § 11-707(e). Finally, the party intending to offer the evidence generally must provide thirty-day's written notice to the other party, including copies of the examiner's report, each chart, the audio or video recording of the pretest interview and actual testing, and a list of any prior examinations taken by the subject. N.M. Stat. Ann. § 11-707(d).

the trial court did not violate a defendant's right of confrontation by refusing to admit polygraph evidence of unproven reliability, where the defendant did not comply with the procedural requirements of Rule 11-707. The Court stated that "[a] defendant's right to present evidence on his own behalf is subject to his compliance with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 877-78 (citing *Chambers v. Mississippi*, 410 U.S. at 302).

Although Rule 11-707 establish detailed requirements to promote polygraph validity, the court refused to follow a mechanical application of the rule and allowed the introduction of exculpatory polygraph evidence in *State v. Baca*, 902 P.2d 65 (N.M. 1995). Despite the defendant's failure to follow the notice requirements of Rule 11-707, the court held that justice and fairness dictated admission where the State administered the exam, knew of the results, and knew that the defendant intended to call the test administrator as a witness. *Id.* at 70.

New Mexico's comprehensive approach regarding admissibility of polygraph evidence is fair to all parties and ensures to the greatest extent possible the reliability of such evidence. Given New Mexico's broad admissibility of polygraph evidence, its courts have not had occasion to consider the constitutional ramifications of excluding such evidence. New Mexico's approach should be emulated by all jurisdictions.<sup>15</sup>

## 3. Stipulated polygraph results are admissible in many states

**Alabama:** The Supreme Court of Alabama permits the admission of polygraph evidence upon stipulation of the parties, subject to certain conditions which relate to the accused's knowledge of his rights thereunder and the trial court's discretion relating to the conduct of the test itself. *Ex parte Clements*, 447 So.2d 695 (Ala. 1984); see also *Hinton v. State*, 548 So.2d 547 (Ala. Crim. App. 1988), *aff'd sub nom Ex parte Hinton*, 548 So.2d 562 (Ala. 1989). Alabama has not reexamined this issue since *Daubert* was decided.<sup>16</sup>

**Arizona:** The State of Arizona led the way in establishing explicit guidelines for party agreements concerning admissibility of polygraph evidence.

<sup>15</sup> See James R. McCall, *Misconceptions and Reevaluation — Polygraph Admissibility After Rock and Daubert*, 1996 U. Ill. L. Rev. 363, 388 ("The New Mexico Supreme Court's comprehensive treatment of the important issues in polygraph admissibility in Rule 11-707 should become a model solution for courts to review in reconsidering the admissibility of such tests. In the treatment of technical aspects of polygraph examination protocol, the rule goes far beyond the case law or statutes of any other jurisdiction in providing usable standards."); see also *amicus* proposed additional *Daubert* factor, *infra* at section III.D.

<sup>16</sup> Alabama has adopted federal Rule 702, Al. R. Evid. 202, and applies *Frye*. See *Ex parte Perry*, 586 So.2d 242 (Ala. 1991).



The Arizona Supreme Court held that polygraph evidence is admissible upon stipulation in criminal cases, when introduced to corroborate other evidence of a defendant's participation in the crime charged or to corroborate or impeach the testimony of a defendant. *State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc). *Valdez* articulated certain qualifications for admissibility:

- (1) any stipulation must be in writing;
- (2) notwithstanding any stipulation, admissibility is subject to the trial judge's discretion;
- (3) the opposing party retains the right to cross-examine the expert; and
- (4) the trial judge should provide a detailed instruction to the jury concerning the weight of the evidence and the purpose for which it is admitted. *Id.* at 900-01.

In *State v. Tinajero*, 935 P.2d 928, 931 (Ariz. Ct. App. 1997), the court reiterated that "[e]vidence regarding polygraph examination is inadmissible absent a stipulation by the parties."<sup>17</sup>

**Arkansas:** Arkansas is a polygraph stipulation state. *Misskelley v. State*, 915 S.W.2d 702, 715 (Ark. 1996); *Houston v. State*, No. CR 87-85, 1988 WL 14162 (Ark. Feb. 22, 1988) (per curiam); *Golston v. State*, 762 S.W.2d 398 (Ark. Ct. App. 1988).<sup>18</sup> Arkansas enacted a statute in 1975 stating that "[t]he results of any such examination as provided in this subchapter shall be inadmissible in all courts in this state." Ark. Code Ann. § 12-12-701 (Michie 1987). However, "the Arkansas Supreme Court has not interpreted this statute literally; rather, such test results are only admissible if both parties enter into a written stipulation agreeing on their admissibility." *Houston v. Lockhart*, 982 F.2d 1246, 1251 (8th Cir. 1993); see also *Wingfield v. State*, 796 S.W.2d 574 (Ark. 1990) (polygraph stipulation must be in writing).

**California:** California currently holds that evidence of a polygraph exam is admissible only upon stipulation by the parties. Polygraph evidence was inadmissible until 1982. *People v. Jones*, 343 P.2d 577 (Cal. 1959); *People v. Houser*, 193 P.2d 937 (Cal. Dist. Ct. App. 1948). In 1982, a California Court of Appeal criticized prior cases which did not question the validity of the inadmissibility determinations. *Witherspoon v. Superior Court*, 183 Cal. Rptr. 615 (Cal. Dist. Ct. App. 1982) (authorizing evidentiary hearings on reliability of polygraphs). The court noted that the term "unreliable" as applied to polygraphs is "an almost 'knee jerk' response, continued some sixty years since the original *Frye* decision, . . . [with judges] subjectively favor[ing] one side of a

<sup>17</sup> Arizona's rule of evidence for the testimony of experts follows Federal Rule 702. Ariz. R. Evid. 702. Despite *Daubert*, Arizona continues to apply *Frye* to admissibility of scientific evidence. *State v. Bible*, 858 P.2d 1152 (Ariz. 1994).

<sup>18</sup> Arkansas adopted the Federal Rules of Evidence and follows *Daubert*. Ark. R. Evid. 702; *Jones v. State*, 862 S.W.2d 242 (Ark. 1993).

dispute . . . ." *Id.* at 618. In 1983, the California legislature passed a statute which declared that polygraph evidence would be inadmissible without stipulations. Cal. Evid. Code § 351.1; see also *People v. Aontae D.*, 30 Cal. Rptr. 2d 176 (Cal. Ct. App. 1994) (upholding constitutionality of statute).<sup>19</sup>

**Delaware:** Absent a stipulation, polygraph examinations are held inadmissible in Delaware. *Thompson v. State*, 399 A.2d 194 (Del. 1979); see also *Melvin v. State*, 606 A.2d 69, 71 (Del. 1992) (admissible "when the prosecution and the defendant both stipulate to the admissibility"); *Foraker v. State*, 394 A.2d 208 (Del. 1978).<sup>20</sup>

**Florida:** In Florida, polygraph results were completely inadmissible to prove the guilt or innocence of a defendant. *Kaminski v. State*, 63 So.2d 339 (Fla. 1952). The current rule is that polygraph results are admissible upon the agreement or stipulation of the parties. *Davis v. State*, 520 So.2d 572 (Fla. 1988); *Delap v. State*, 440 So.2d 1242 (Fla. 1983).<sup>21</sup>

**Georgia:** The first Georgia case to explicitly hold polygraph evidence admissible upon stipulation was *State v. Chambers*, 239 S.E.2d 324 (Ga. 1977). Accord *Forehand v. State*, 477 S.E.2d 560 (Ga. 1996). This ruling overturned Georgia's *per se* inadmissibility policy. *Famber v. State*, 213 S.E.2d 525 (Ga. Ct. App. 1975).<sup>22</sup>

**Idaho:** The general rule in Idaho is that a polygraph examination is not admissible into evidence absent stipulation by both parties, even if exculpatory. *State v. Fain*, 774 P.2d 252 (Idaho 1989); accord *State v. Grube*, 883 P.2d 1069 (Idaho 1994). When parties do stipulate to admissibility, the trial court retains discretion to exclude evidence if it finds that an examiner was not qualified or that the conditions under which the test was administered were unfair. *Fain*, 774 P.2d at 257.<sup>23</sup>

**Indiana:** An expert may testify regarding polygraph examination results,

<sup>19</sup> California has not adopted federal Rule 702 and rejected *Daubert*, as applied to its evidence rules. Cal. Evid. Code § 801; *People v. Leahy*, 882 P.2d 321 (Cal. 1994) (in banc).

<sup>20</sup> Delaware follows the Federal Rules of Evidence in its provisions for expert testimony. Del. R. Evid. 702. The *Daubert* standard for admitting evidence is also used in Delaware. *State v. Ruthardt*, 680 A.2d 349 (Del. Super. Ct. 1996).

<sup>21</sup> The Florida statute regarding evidence is virtually identical to Federal Rule 702. Fla. Stat. ch. 90.702 (1994). The Florida Supreme Court rejected *Daubert*'s flexible standard of admissibility in favor of the stringent general acceptance *Frye* test for scientific evidence. *Flanagan v. State*, 625 So.2d 827 (Fla. 1993).

<sup>22</sup> The Georgia Code appears to reflect the intent of federal Rule 702, and under state case law, supports a *Daubert* standard for admitting scientific evidence. Ga. Code Ann. § 24-9-67 (1995); *Chester v. State*, 473 S.E.2d 759 (Ga. 1996) (Hunstein, J., concurring specially) (citing *Smith v. State*, 277 S.E.2d 678 (Ga. 1981)).

<sup>23</sup> Idaho follows the Federal Rules of Evidence. Idaho R. Evid. 702. Idaho has not addressed *Daubert* but follows a similar standard. *State v. Gleason*, 844 P.2d 691 (Idaho 1992).



provided the parties stipulate to admissibility. *McDonald v. State*, 328 N.E.2d 436 (Ind. Ct. App. 1975). This represents a modification of the general inadmissibility rule articulated in *Zupp v. State*, 283 N.E.2d 540 (Ind. 1972).<sup>24</sup>

**Iowa:** *State v. McNamara*, 104 N.W.2d 568 (Iowa 1960), is the leading case in Iowa on the admissibility of polygraph evidence when there is an agreement between the parties. See also *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984) (exculpatory polygraph excluded due to absence of stipulation). The Supreme Court of Iowa has not expressed if *Daubert* applies to all scientific evidence but has followed the standard in the cases to date. *Williams v. Hedican*, 561 N.W.2d 817, 827 (Iowa 1997) (examined a civil case under *Daubert* analysis because neither party objected to using that standard at trial).<sup>25</sup>

**Kansas:** The Kansas Supreme Court held that polygraph results are inadmissible without a stipulation in *State v. Lassley*, 545 P.2d 383 (Kan. 1976). Accord *State v. Clemons*, 929 P.2d 749 (Kan. 1996). The requirements for admission are, first, a prior stipulation of the parties, and second, the trial judge's satisfaction that the examiner was qualified and that the test was conducted under proper conditions. *Lassley*, 545 P.2d at 385.<sup>26</sup> Further procedural requirements were established by the Kansas Supreme Court in *State v. Roach*, 576 P.2d 1082 (Kan. 1978) (e.g., written stipulation required; may cross-examine expert).

**Nevada:** In the absence of a stipulation, polygraph evidence is inadmissible in Nevada. *Corbett v. State*, 584 P.2d 704 (Nev. 1978) (relying on *State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc)); accord *Domingues v. State*, 917 P.2d 1364 (Nev. 1996); *American Elevator Co. v. Briscoe*, 572 P.2d 534 (Nev. 1977) (absent stipulation, polygraph inadmissible to impeach or to corroborate witness' testimony).<sup>27</sup>

**New Jersey:** New Jersey courts will admit polygraph evidence pursuant to a carefully drafted stipulation. *State v. Baskerville*, 374 A.2d 441 (N.J. 1977); *State v. McDavitt*, 297 A.2d 849 (N.J. 1972). At one time, polygraphs were

<sup>24</sup> Although not viewed as binding, Indiana recognizes the *Daubert* standard as "helpful" in applying Indiana Rule of Evidence 702. Ind. R. Evid. 702. *McGrew v. State*, 673 N.E.2d 787, 797 (Ind. Ct. App. 1996).

<sup>25</sup> Iowa follows the Federal Rules of Evidence. Iowa R. Evid. 702.

<sup>26</sup> Kansas has a rule of evidence which is similar, though not identical, to federal Rule 702. Kan. Stat. Ann. § 60-456 (1994). Kansas still holds that the *Frye* standard governs admissibility of expert scientific evidence. *Armstrong v. City of Wichita*, 907 P.2d 923 (Kan. Ct. App. 1996).

<sup>27</sup> Nevada follows the Federal Rules of Evidence in its provision for expert testimony. Nev. Rev. St. Ann. § 50.285 (1996). Rather than adopt *Frye*, Nevada enacted statutes that set standards similar to *Daubert*. *Scantillanes v. State*, 765 P.2d 1147 (Nev. 1988).

inadmissible in criminal cases. *State v. Driver*, 183 A.2d 655 (N.J. 1962).<sup>28</sup>

**North Dakota:** While the state Supreme Court generally holds polygraph evidence inadmissible, *State v. Pusch*, 46 N.W.2d 508 (N.D. 1950); *State v. Newnam*, 409 N.W.2d 79 (N.D. 1987), lower courts have suggested polygraphs may be admissible at trial by stipulation of the parties. *City of Bismarck v. Berger*, 465 N.W.2d 480, 481 (N.D. Ct. App. 1991). Additionally, in ruling on a motion for new trial, the trial court must consider stipulated polygraph test results. *State v. Olmstead*, 261 N.W.2d 880 (N.D. 1978); *Healy v. Healy*, 397 N.W.2d 71, 74 n.1 (N.D. 1986).<sup>29</sup>

**Ohio:** Ohio permits polygraph results based on the same restrictions established in *State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc). Accord *State v. Souel*, 372 N.E.2d 1318 (Ohio 1978); *State v. Hesson*, 675 N.E.2d 532, 541 (Ohio Ct. App. 1996). Some Ohio cases also have held polygraph results to be admissible where they were offered for a purpose other than to establish truthfulness. *State v. Kniep*, 622 N.E.2d 1138, 1142 (Ohio Ct. App. 1993).<sup>30</sup>

**Utah:** Utah will admit polygraphs by stipulation. *State v. Jenkins*, 523 P.2d 1232 (Utah 1974); *State v. Rowley*, 386 P.2d 126 (Utah 1963). A later case, *State v. Collins*, 612 P.2d 775 (Utah 1980), held that even if there is a stipulation, admissibility must be premised upon proof of the examiner's qualifications and the validity of the examination.<sup>31</sup>

**Washington:** The state of Washington accepts polygraph evidence when the parties stipulate, in writing, to its admission. *State v. Ross*, 497 P.2d 1343, 1347-48 (Wash. 1972); accord *State v. Gregory*, 910 P.2d 505 (Wash. 1996).<sup>32</sup>

**Wyoming:** In *Cullin v. State*, 565 P.2d 445, 455 (Wyo. 1977), the

<sup>28</sup> New Jersey has not adopted the Federal Rules of Evidence, and the State generally follows the *Frye* standard. *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Dishon*, 687 A.2d 1074 (N.J. Super. Ct. App. Div. 1997).

<sup>29</sup> North Dakota has adopted Fed. R. Evid. 702. N.D. R. Evid. 702. In *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994), the Supreme Court of North Dakota acknowledged the *Daubert* decision, but ultimately applied *Frye*.

<sup>30</sup> Ohio follows the Federal Rules of Evidence. Ohio R. Evid. 702. A test for admissibility of scientific evidence is similar to *Daubert*. *State v. Pierce*, 597 N.E.2d 107 (Ohio 1992).

<sup>31</sup> Utah's rule of evidence is identical to the Fed. R. Evid. 702. Utah R. Evid. 702. The Utah Supreme Court initially abandoned its exclusive reliance on *Frye* in favor of an "inherent reliability" test in *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980). See also *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). This test "provides a more detailed and rigorous outline for trial courts to follow" than the *Daubert* standard. *State v. Crosby*, 927 P.2d 638, 642 (Utah 1996) (record failed to demonstrate that a polygraph lacking stipulation was reliable).

<sup>32</sup> Washington follows federal Rule 702. Wash. R. Rev. ER 702. In *State v. Jones*, 922 P.2d 806, 808 (Wash. 1996), the Washington Supreme Court followed the *Frye* standard of general acceptance for scientific evidence.

Wyoming Supreme Court recognized the admissibility of stipulated polygraph tests, but allowed for judicial discretion prior to their introduction. *See also Schmunk v. State*, 714 P.2d 724, 731 (Wyo. 1986) ("In the absence of a stipulation for admission, a conviction must be reversed when the results of a polygraph are revealed to the jury").<sup>33</sup>

#### B. Polygraph evidence is inadmissible *per se* in the majority of states

Very few states falling within the "inadmissible" category have addressed the constitutional ramifications of a *per se* rule precluding an otherwise reliable polygraph proffered by the defense. *See, e.g., Perkins v. State*, 902 S.W.2d (Tex. Ct. App. 1995); *State v. Porter*, No. SC 15363, 1997 WL 26502 (Conn. May 20, 1997).

**Alaska:** Polygraph tests have not yet been judicially accepted by Alaska appellate courts for use in criminal trials. *Troyer v. State*, 614 P.2d 313 (Alaska 1980); *Pulakis v. State*, 476 P.2d 474 (Alaska 1970).<sup>34</sup>

**Colorado:** Colorado employed the *Frye* test in 1981 and ruled that polygraphs were inadmissible. *People v. Anderson*, 637 P.2d 354, 358 (Colo. 1981) (en banc). Recently, in *People v. Lyons*, 907 P.2d 708 (Colo. Ct. App. 1995), the Colorado Court of Appeals rejected the argument that *Daubert* necessitated a change in polygraph admissibility. "*Daubert* concerned only the interpretation of the federal rules of evidence and was not decided on constitutional grounds. Hence, it is not binding on Colorado courts . . . . [W]hile [Colo. R. Evid.] 702 applies to certain types of novel scientific evidence, the *Frye* test still applies to polygraph evidence." *Id.* at 712 (citing *Lindsey v. People*, 892 P.2d 281 (Colo. 1995)) (other citations omitted).<sup>35</sup>

**Connecticut:** The Supreme Court of Connecticut recently applied *Daubert* in rejecting the admissibility of polygraph tests. *Porter*, 1997 WL 26502, at \*6. "We see no reason to abandon our well established rule of exclusion, and we conclude that polygraph evidence should remain *per se* inadmissible in all trial court proceedings in which the rules of evidence apply, and for all trial purposes, in Connecticut courts." *Id.* at \*18.<sup>36</sup>

**District of Columbia:** The District of Columbia is a *per se* inadmissible

<sup>33</sup> Wyoming adopted federal Rule 702, and it applies *Daubert*. Wyo. R. Evid. 702; *Springfield v. State*, 860 P.2d 435 (Wyo. 1993).

<sup>34</sup> Alaska adopted federal Rule 702. Ak. R. Evid. 702. Alaska continues to follow *Frye*. *Mattox v. State Dep't of Revenue*, 875 P.2d 763 (Alaska 1994).

<sup>35</sup> Colorado Rule of Evidence 702 is identical to federal Rule 702 regarding scientific evidence admissibility. Colo. R. Evid. 702.

<sup>36</sup> Connecticut does not follow the Federal Rules. *Id.* at \*33 (Berdon, J., concurring).

state. This policy was first established in *Smith v. United States*, 389 A.2d 1356, 1359 (D.C. 1978). *Accord Contee v. United States*, 667 A.2d 103, 104 n.4 (D.C. 1995).<sup>37</sup>

**Hawaii:** The current state of the law in Hawaii is that polygraph evidence is *per se* inadmissible. *State v. Antone*, 615 P.2d 101, 109 (Haw. 1980); *State v. Chang*, 374 P.2d 5, 11 (Haw. 1962).<sup>38</sup>

**Illinois:** Illinois is currently a *per se* inadmissible state with regards to polygraph evidence. Initially, stipulated polygraph evidence was acceptable. *People v. Zazzetta*, 189 N.E.2d 260, 263 (Ill. 1963) (rejecting, without stipulations, the results of polygraph examinations); *People v. Ferguson*, 405 N.E.2d 21, 25 (Ill. App. Ct. 1980). The stipulation approach was rejected in *People v. Baynes*, 430 N.E.2d 1070 (Ill. 1981) (citing *Alexander*, 526 F.2d at 168). Most recently, this rule of inadmissibility was reaffirmed by the Illinois Supreme Court in *People v. Gard*, 632 N.E.2d 1026, 1032 (Ill. 1994); cf. *People v. Melock*, 599 N.E.2d 941 (Ill. 1992) (polygraph admissible where relevant to an issue other than truthfulness).<sup>39</sup>

**Kentucky:** In 1991, Kentucky held that polygraph evidence is inadmissible. *Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991) ("under no circumstances should polygraph results be admitted into evidence"). The Kentucky Supreme Court specifically overruled *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979) and *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957), both of which had stated that polygraph results could be admissible if there were stipulations. *Morton*, 817 S.W.2d at 222.<sup>40</sup>

**Louisiana:** Polygraphs are inadmissible despite greater discretion given to trial judges for consideration of scientific evidence. *State v. Catanese*, 368 So.2d 975, 981 n.19 (La. 1979) ("[T]he policy reasons for excluding polygraph evidence in the present case are more compelling than the evidentiary rules relied upon in [*Chambers v. Mississippi*]."); *see also State v. Foret*, 628 So.2d 1116, 1123 (La. 1993). The *Catanese* court held that polygraph evidence could

<sup>37</sup> "Although there has been some suggestion that the District of Columbia abandon *Frye* in favor of Federal Rule of Evidence 702, the District of Columbia remains, to this point, a *Frye* jurisdiction." *Oxendine v. Merrell Dow Pharm., Inc.*, Civ. No. 82-1245, 1996 WL 680992, at \*34 (D.C. Super. Oct. 24, 1996) (mem. op.).

<sup>38</sup> Hawaii's evidence statute is almost identical to the Federal Rules of Evidence. *See* Haw. Rev. Stat. § 626.1, Rule 702 (1995). While not addressing *Daubert*, Hawaii uses a similar rule. *State v. Montalbo*, 828 P.2d 1274 (Haw. 1992).

<sup>39</sup> Illinois does not follow the Federal Rules of Evidence; it rejected *Daubert* and continues to follow *Frye*. *People v. Lowitzki*, 674 N.E.2d 859 (Ill. App. Ct. 1996).

<sup>40</sup> Kentucky's Rule 702 is identical to federal Rule 702, but it was enacted in 1992 after the *Morton* decision. Ky. R. Evid. 702. While not specifically addressing polygraphs, Kentucky adopted the *Daubert* standard of review for admissibility of scientific evidence. *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995).



be admissible in the future, but that "there has not yet been enough judicial experience with polygraph evidence in Louisiana to provide an adequate basis for judicial rule making on this scale." 368 So.2d at 982.<sup>41</sup> In an interesting juxtaposition with its ruling on trial admissibility, the *Catanese* court holds that polygraph evidence is admissible "within judicial discretion" in certain post-trial proceedings. *Id.*

**Maine:** The Supreme Judicial Court of Maine has consistently held that "the results of polygraph tests and a party's willingness or unwillingness to take such a test are inadmissible." *State v. Gagne*, 343 A.2d 186, 192 (Me. 1975) (citing *State v. Casale*, 110 A.2d 588 (Me. 1954)); see also *State v. Trafton*, 425 A.2d 1320 (Me. 1981); *State v. Mower*, 314 A.2d 840, 841 (Me. 1974)).<sup>42</sup>

**Maryland:** The Court of Appeals of Maryland is firmly rooted in its opposition to admitting polygraph tests for any purpose. *State v. Hawkins*, 604 A.2d 489, 492 (Md. 1992); see also *Johnson v. State*, 495 A.2d 1, 14 (Md. 1985). The case law, however, does suggest that polygraphs may be admissible if reliability of the testing improves. *Kelley v. State*, 418 A.2d 217, 219 (Md. 1980).<sup>43</sup>

**Massachusetts:** Massachusetts currently excludes polygraph evidence as inadmissible *per se*. *Commonwealth v. Stewart*, 663 N.E.2d 255 (Mass. 1996). However, Massachusetts is generally regarded as the first state to permit limited admissibility of polygraph evidence. In *Commonwealth v. A Juvenile (No. 1)*, 313 N.E.2d 120, 126-27 (Mass. 1974), the court held that polygraph evidence was admissible upon compliance with detailed procedural requirements, to include stipulation by the parties and "close scrutiny" of the examiner's qualifications. *Commonwealth v. Vitello*, 381 N.E.2d 582, 596-97 (Mass. 1978), recognized that polygraph evidence is admissible to impeach or corroborate the defendant's testimony, but excluded polygraph evidence during the case in chief because the defendant did not testify. The court specifically declined to consider the admissibility of polygraphs where the defendant's truthfulness is an ultimate issue. *Id.* at 596 n.23.

The exceptions of *A Juvenile* and *Vitello* were overruled in *Commonwealth v. Mendes*, 547 N.E.2d 35 (Mass. 1989). "[O]ur hope that polygraphy would mature to the point of general scientific acceptance has not materialized.

<sup>41</sup> Louisiana adopted federal Rule 702 in 1989 and subsequently adopted *Daubert*'s analysis for assessing reliability. La. C.E., art. 702; *State v. Foret*, 628 So. 2d 1116 (La. 1993).

<sup>42</sup> Maine follows federal Rule 702. Me. R. Evid. 702. While using a similar standard, Maine has not specifically addressed *Daubert*. *State v. Preston*, 581 A.2d 404 (Me. 1990).

<sup>43</sup> The Maryland rule of scientific evidence specifically incorporates *Daubert*. Md. Rule 5-702. "Maryland Rule 5-702's three-pronged test demands a more detailed preliminary inquiry than Federal Rule of Evidence 702." Kevin M. Carroll, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 Md. L. Rev. 1085, 1087 (1995).

Further hope or expectation in that regard is no longer warranted. Thus, whatever justification there may have been for our single departure from the *Frye* rule in *A Juvenile* and *Vitello*, that justification no longer exists. . . . We announce that polygraphic evidence, with or without pretest stipulation, is inadmissible in criminal trials in [Massachusetts] either for substantive purposes or for corroboration or impeachment of testimony." *Mendes*, 547 N.E.2d at 41.<sup>44</sup>

**Michigan:** Michigan holds polygraph evidence to be inadmissible. *People v. Davis*, 72 N.W.2d 269 (Mich. 1955); *People v. Becker*, 2 N.W.2d 503 (Mich. 1942). However, polygraph evidence may be considered by a judge in ruling on a motion for new trial. *People v. Barbara*, 255 N.W.2d 171, 181-94 (Mich. 1977).<sup>45</sup>

**Minnesota:** Minnesota rejects polygraphs as inadmissible *per se*. *State v. Opsahl*, 513 N.W.2d 249, 253 (Minn. 1994); *State v. Kolander*, 52 N.W.2d 458, 465 (Minn. 1952). The Minnesota Court of Appeals addressed, and rejected, the argument that the polygraph results should be admissible based on stipulations in *State v. Litzau*, 377 N.W.2d 53 (Minn. Ct. App. 1985).<sup>46</sup>

**Mississippi:** Mississippi's inadmissible *per se* position can be traced back to *Hawkins v. State*, 77 So.2d 263 (Miss. 1955). See also *Carr v. State*, 655 So.2d 824 (Miss. 1995); *Thorson v. State*, 653 So.2d 876 (Miss. 1994). Mississippi has held, however, that "evidence of an offer to take a polygraph is only admissible to support the credibility of a witness whose veracity has previously been attacked." *Lester v. State*, 692 So.2d 755, 787 (Miss. 1997) (citing *Conner v. State*, 632 So.2d 1239, 1258 (Miss. 1993)).<sup>47</sup>

**Missouri:** Originally, Missouri courts admitted polygraphs results upon stipulation. *State v. Fields*, 434 S.W.2d 507 (Mo. 1968); see also *State v. Ghan*, 558 S.W.2d 304 (Mo. Ct. App. 1977). The Missouri Supreme Court corrected the "erroneous" interpretation that *Fields* authorized inadmissible

<sup>44</sup> Although Massachusetts has not adopted federal Rule 702, it applies a *Daubert* analysis to determine the admissibility of scientific evidence. *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994).

<sup>45</sup> Michigan adopted federal Rule 702 in 1978. Mich. R. Evid. 702. However, it has yet to reject *Frye* in favor of *Daubert*. *People v. McMillan*, 539 N.W.2d 553 (Mich. Ct. App. 1995).

<sup>46</sup> Minnesota adopted federal Rule 702 in 1977. Minn. R. Evid. 702. The Minnesota Supreme Court has expressed no opinion regarding whether or not *Daubert* supersedes *Frye* for purposes of interpreting the Minnesota Rules of Evidence. See *State v. Klawitter*, 518 N.W.2d 577, 578 n.1 (Minn. 1994).

<sup>47</sup> Mississippi has a polygraph licensing statute: "Nothing in this chapter shall be construed as permitting the results of truth examinations or polygraph examinations to be introduced or admitted as evidence in a court of law." Miss. Code Ann. § 73-29-47 (1995). Mississippi follows federal Rule 702 and applies the *Frye* test. Miss. R. Evid. 702; *Polk v. State*, 612 So.2d 381 (Miss. 1992).



polygraph evidence to be admitted upon stipulation in *State v. Biddle*, 599 S.W.2d 182, 191 (Mo. 1980) (en banc). *Biddle* controls Missouri's current policy on polygraph evidence. *State v. Burch*, 939 S.W.2d 525, 528 (Mo. Ct. App. 1997) (polygraph evidence inadmissible in criminal trials).<sup>48</sup>

**Montana:** Montana strongly opposes the admission of polygraph examinations. *State v. Staat*, 811 P.2d 1261, 1262 (Mont. 1991); *State v. Hollywood*, 358 P.2d 437 (Mont. 1960). "[C]ourts continue to doubt the 'lie detector's' reliability." *State v. McClean*, 587 P.2d 20, 22-23 (Mont. 1978) (citing *Alexander*, 526 F.2d at 165). In *State v. Bashor*, 614 P.2d 470, 480 (Mont. 1980), Montana specifically rejected New Mexico's approach to polygraph evidence.<sup>49</sup>

**Nebraska:** Nebraska uniformly disfavors polygraph evidence. *State v. Allen*, 560 N.W.2d 829, 842 (Neb. 1997); *State v. Houser*, 450 N.W.2d 697, 702 (Neb. 1990); *Boeche v. State*, 37 N.W.2d 593, 597 (Neb. 1949).<sup>50</sup>

**New Hampshire:** New Hampshire follows the general rule that polygraph evidence is not admissible. *State v. Ober*, 493 A.2d 493 (N.H. 1985); *State v. LaForest*, 207 A.2d 429 (N.H. 1965). However, New Hampshire has not ruled whether stipulated polygraph tests are admissible. See *LaForest*, 207 A.2d at 431; and *State v. Stewart*, 364 A.2d 621, 623-24 (N.H. 1976) (declining to rule on the issue, but noting that the Massachusetts case of *Commonwealth v. A Juvenile (No. 1)*, 313 N.E.2d 120 (Mass. 1974), held that stipulated polygraphs are admissible).<sup>51</sup>

**New York:** New York views polygraph evidence as unreliable and inadmissible. *People v. Angelo*, 666 N.E.2d 1333 (N.Y. 1996); *People v. Shedrick*, 489 N.E.2d 1290 (N.Y. 1985); *People v. Leone*, 255 N.E.2d 696 (N.Y. 1969).<sup>52</sup>

<sup>48</sup> Missouri follows federal Rule 702. Mo. Ann. Stat. § 490-050 (1996). The State acknowledged *Daubert*, but continues to follow *Frye*. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. 1993).

<sup>49</sup> Montana's rule concerning scientific evidence admissibility is the same as federal Rule 702. Mont. Code Ann. 26-10-702 (1995). Montana has adopted *Daubert*. *State v. Moore*, 885 P.2d 457 (Mont. 1994).

<sup>50</sup> Nebraska adopted federal Rule 702, but continues to follow *Frye* to measure scientific evidence. Neb. Rev. St. § 27-702 (1995); see *State v. Case*, 553 N.W.2d 173, 184 (Neb. Ct. App. 1996); *State v. Carter*, 524 N.W.2d 763 (Neb. 1994).

<sup>51</sup> New Hampshire has language identical to federal Rule 702. N.H. R. Evid. 702. However, New Hampshire has not yet addressed whether *Daubert* applies to its evidentiary rule. See *State v. Cavaliere*, 663 A.2d 96, 97 (N.H. 1995) (holding that because the parties stipulated to use of *Daubert* instead of *Frye*, the issue need not be addressed).

<sup>52</sup> New York has not adopted the Federal Rules of Evidence. The New York standard for admitting scientific evidence is the *Frye* standard. *People v. Wesley*, 633 N.E.2d 451, 454 n.2 (N.Y. 1994); *People v. Victory*, 631 N.Y.S.2d 805, 811 n.12 (N.Y. Crim. Ct. 1995) ("New York which does not model its evidence 'rules' on the Federal Code still follows the *Frye* standard.").

**North Carolina:** At one time, North Carolina allowed for admission of polygraph evidence where the parties stipulated to admissibility. *State v. Meadows*, 295 S.E.2d 394 (N.C. 1982); *State v. Milano*, 256 S.E.2d 154, 163 (N.C. 1979) (polygraph stipulation must be in writing). However, North Carolina changed its stance on polygraphs and ruled instead that they are inadmissible *per se*. *State v. Grier*, 300 S.E.2d 351 (N.C. 1983); see also *State v. Jones*, 466 S.E.2d 696 (N.C. 1996). Although not specifically endorsing *Daubert*, North Carolina case law applies a similar test. *State v. Spencer*, 459 S.E.2d 812 (N.C. Ct. App. 1995).<sup>53</sup>

**Oklahoma:** Prior to 1975, parties could stipulate to the admissibility of polygraph evidence in Oklahoma. See *Castleberry v. State*, 522 P.2d 257 (Okla. Crim. App. 1974); *Jones v. State*, 527 P.2d 169 (Okla. Crim. App. 1974). This option was foreclosed in *Fulton v. State*, 541 P.2d 871 (Okla. Crim. App. 1975) (per curiam). *Accord Birdsong v. State*, 649 P.2d 786, 788 (Okla. Crim. App. 1982). Now, "it is well settled that the results of a polygraph test are not admissible for any purpose." *Paxton v. State*, 867 P.2d 1309, 1323 (Okla. Crim. App. 1993).<sup>54</sup>

**Oregon:** Oregon generally holds polygraph evidence to be inadmissible. Initially, Oregon allowed the introduction of such evidence in limited circumstances. *State v. Green*, 531 P.2d 245 (Or. 1975) (admissible to rebut an assertion of coerced confession); *State v. Brown*, 687 P.2d 751 (Or. 1984) (admissible upon stipulation). However, the Oregon Supreme Court overruled *Green* and *Brown* in *State v. Lyon*, 744 P.2d 231 (Or. 1987), holding that polygraph test results are inadmissible, even where the parties stipulate to introduction.<sup>55</sup>

**Pennsylvania:** In 1955, Pennsylvania refused to admit polygraph evidence and has maintained its position to this day. *Riccio v. Dilworth*, 115 A.2d 865 (Pa. Super. Ct. 1955); see also *Commonwealth v. Butler*, 621 A.2d 630, 632 (Pa. Super. Ct. 1993); *Commonwealth v. Brockington*, 455 A.2d 627 (Pa. 1983). The inadmissibility rule holds even if there is a stipulation. *Commonwealth v. Pfender*, 421 A.2d 791 (Pa. Super. Ct. 1980).<sup>56</sup>

<sup>53</sup> North Carolina adopted federal Rule 702 in 1983, see N.C. Gen. Stat. § 8C-1, Rule 702 (1997), and had rejected *Frye* prior to the *Daubert* decision. See *State v. Pennington*, 393 S.E.2d 847 (N.C. 1990).

<sup>54</sup> Oklahoma adopted federal Rule 702 in 1978. Okla. Stat. Ann. tit. 12, § 2702 (West 1993). *Daubert* was adopted in *Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995).

<sup>55</sup> Oregon follows Fed. R. Evid. 702. Or. Rev. St. § 40.410 (1988). Oregon chose not to follow a strict adherence to *Frye* or *Daubert*, preferring to administer a traditional Rule 401/403 balancing test. *State v. Lyons*, 924 P.2d 802 (Or. 1995).

<sup>56</sup> Pennsylvania does not follow the Federal Rules of Evidence. Pennsylvania also refused to adopt *Daubert*, continuing to follow *Frye* for admitting scientific evidence. *Commonwealth v. Blasioli*, 685 A.2d 151, 160 n.19 (Pa. Super. Ct. 1996).

**Rhode Island:** Rhode Island has taken the position that polygraph examinations are scientifically unreliable and inaccurate. *State v. Dery*, 545 A.2d 1014 (R.I. 1988). The Rhode Island Supreme Court was concerned that a subject might employ "countermeasures" leading to inaccurate polygraph results. *Id.* at 1017; see also *State v. Juarez*, 570 A.2d 1118 (R.I. 1990) (holding polygraph evidence inadmissible). In reviewing whether *Dery* survives under *Daubert*, the Rhode Island Supreme Court noted that "[*Dery*] was based not only on the *Frye* standard, but also on the inaccuracy of the polygraph test . . . . *Dery* is therefore consistent with the opinion of the Supreme Court in *Daubert*." *In re Odell*, 672 A.2d 457, 459 (R.I. 1996) (per curiam).<sup>57</sup>

**South Carolina:** The state of South Carolina does not allow evidence from polygraph examinations. *State v. Copeland*, 300 S.E.2d 63, 69 (S.C. 1982); see also *State v. Wright*, 471 S.E.2d 700 (S.C. 1996).<sup>58</sup>

**South Dakota:** After noting that a majority of states did not permit admission of polygraph evidence, the Supreme Court of South Dakota held it was not "persuaded that [South Dakota] should abandon the traditional rule of inadmissibility in favor of a rule that defendants and complaining witnesses may be ordered to submit to polygraph examinations upon a defendant's motion and that the results of such examinations be admissible at trial." *State v. Watson*, 248 N.W.2d 398, 399 (S.D. 1976); accord *State v. Muetze*, 368 N.W.2d 575 (S.D. 1985); see also *Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985) (polygraph inadmissible in civil or criminal cases).<sup>59</sup>

**Tennessee:** Tennessee rejects polygraph evidence in criminal prosecutions. *Marable v. State*, 313 S.W.2d 451 (Tenn. 1958); see also *State v. Campbell*, 904 S.W.2d 608 (Tenn. Crim. App. 1995). Potentially exculpatory evidence is still inadmissible. *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988); see also *State v. Land*, 681 S.W.2d 589 (Tenn. Crim. App. 1984).<sup>60</sup>

**Texas:** Texas' doctrine of *per se* inadmissibility dates back to *Peterson v. State*, 247 S.W.2d 110 (Tex. Crim. App. 1951). "[T]his Court has not yet

<sup>57</sup> Rhode Island follows federal Rule 702. R.I. R. Evid. 702. Rhode Island has left open the extent to which *Daubert* will be applied in its jurisdiction. *State v. Quattrocchi*, 681 A.2d 879, 884 n.2 (R.I. 1996).

<sup>58</sup> South Carolina has adopted Federal Rule 702, although it never officially adopted *Frye* or *Daubert* for its standard of admitting scientific evidence. S.C. R. Evid. 702; see *State v. Morgan*, 485 S.E.2d 112, 115 (S.C. 1997).

<sup>59</sup> South Dakota adopted federal Rule 702 in 1978, and has subsequently applied the *Daubert* analysis. S.D. Codified Laws Ann. § 19-15-2 (1995); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994).

<sup>60</sup> Tennessee adopted federal Rule 702 in 1990. Tenn. R. Evid. 702. The State uses a standard of admissibility similar to *Daubert*. *State v. Schimpf*, 782 S.W.2d 186 (Tenn. Crim. App. 1989).

authorized the admission of such evidence on behalf of the State, and, until this is done, it cannot be admitted on behalf of the defendant." *Id.* at 111; see also *Chandler v. State*, 744 S.W.2d 341, 344 (Tex. Ct. App. 1988) (exculpatory polygraph inadmissible). The doctrine also effectively prevents the parties from stipulating to use of the results at trial. *Nethery v. State*, 692 S.W.2d 686 (Tex. Crim. App. 1985) (en banc).<sup>61</sup>

**Vermont:** In *State v. Hamlin*, 499 A.2d 45 (Vt. 1985), the Supreme Court of Vermont upheld the trial court's decision to exclude polygraph evidence because an adequate foundation had not been laid. However, the court left open "the proper standard for disposing of such issues — the scientific reliability of polygraph tests, the qualifications of the examiner, and the wide range of variables produced by different subjects." *Id.* at 54.<sup>62</sup>

**Virginia:** Polygraph evidence may not be admitted in Virginia. *Lee v. Commonwealth*, 105 S.E.2d 152 (Va. 1952). "Polygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties." *Taylor v. Commonwealth*, 348 S.E.2d 36, 38 (Va. Ct. App. 1986); see also *Odum v. Commonwealth*, 301 S.E.2d 145 (Va. 1983) (stipulated results not admissible).<sup>63</sup>

**West Virginia:** The West Virginia Supreme Court of Appeals held that "polygraph evidence is not admissible in [West Virginia]." *State v. Frazier*, 252 S.E.2d 39, 50 (W. Va. 1979); see also *State v. Sheppard*, 310 S.E.2d 173, 192 (W. Va. 1983). Recently, West Virginia has acknowledged its willingness to admit polygraph evidence for witness impeachment purposes. *State v. Blake*, 478 S.E.2d 550 (W. Va. 1996).<sup>64</sup>

**Wisconsin:** In *State v. Dean*, 307 N.W.2d 628 (Wis. 1981), the Wisconsin Supreme Court declared previously acceptable polygraph evidence to be inadmissible. This case overruled the stipulation allowance of previous precedent under *State v. Stanislawski*, 216 N.W.2d 8 (Wis. 1974). *Le Fevre v. State*, 8

<sup>61</sup> Texas adopted federal Rule 702 in 1986. Tex. R. Crim. Evid. 702. While disclaiming the *Frye* standard and not specifically addressing *Daubert*, Texas has found that the *per se* inadmissible rule survives constitutional scrutiny under the state evidence statute. *Perkins*, 902 S.W.2d 88.

<sup>62</sup> Vermont also adopted federal Rule 702 in 1983. Vt. R. Evid. 702. Although not specifically stating so, Vermont appears to apply *Daubert* when testing scientific evidence. See *State v. Rolfe*, 686 A.2d 949 (Vt. 1996) (concerning infrared spectrophotometry).

<sup>63</sup> Virginia adopted federal Rule 702 for civil cases only. Va. Code Ann. § 8.01-401.1 (1992). A standard similar to *Daubert* governs admissibility. *Spencer v. Commonwealth*, 393 S.E.2d 609 (Va. 1990).

<sup>64</sup> West Virginia follows federal Rule 702. W.V. R. Evid. 702. West Virginia also follows *Daubert* in analyzing scientific evidence. *Wilt v. Burbacker*, 443 S.E.2d 196 (W. Va. 1993). However, the Supreme Court of Appeals held that *Daubert* does not necessitate a change in the inadmissibility of polygraph evidence. *State v. Beard*, 461 S.E.2d 486 (W. Va. 1995).



N.W.2d 288 (Wis. 1943), appears to be the first reported case of stipulated use of polygraph evidence among the states.<sup>65</sup>

## II. MILITARY RULE OF EVIDENCE 707 WORKS TO UNCONSTITUTIONALLY DEPRIVE A MILITARY ACCUSED THE OPPORTUNITY TO PRESENT A DEFENSE

This Honorable Court displayed great foresight in the non-exclusive listing of *Daubert* admissibility factors. 509 U.S. at 593-94. *Daubert* must now undergo the next logical evolution for application to criminal trials in a manner consistent with the Constitution.

### A. Due process applies to the military justice system

Although the military is a "specialized society separate from civilian society," the burden is on the Government to justify any departure from principal constitutional protections. See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (character of military community and mission requires a different application of First Amendment protections where speech may undermine effectiveness of response to command). This Court has previously considered due process challenges to courts-martial in determining whether a servicemember received "a fair trial in a fair tribunal." *Weiss v. United States*, 510 U.S. 163, 178 (1994) (appointment of military judges does not violate appointments clause) (citations omitted). This Courts' opinions concerning the Constitution's application to the military justice system have exhibited a theme of extending constitutional rights to servicemembers without limitation, except where necessary due to the unique character of the military.

Petitioner suggests that some Sixth Amendment protections, including the right to present a defense, are 'procedural complexities' which burden military trials. See Petitioner's Brief at 42 (citing *Middendorf v. Henry*, 425 U.S. 25 (1976)). Apparently, complex issues regarding polygraph evidence are deemed beyond the comprehension of military courts despite the admission of other types of scientific evidence.<sup>66</sup> While the President and Congress may establish

<sup>65</sup> Wisconsin follows the Federal Rules of Evidence. Wis. Stat. Ann. § 907.02 (West 1993). The State applies a standard similar to *Daubert*. *State v. Walstad*, 351 N.W.2d 469 (Wis. 1984).

<sup>66</sup> Examples of complex expert evidence admissible in a court-martial include: DNA, *United States v. Youngberg*, 43 M.J. 379 (C.A.A.F. 1995); chemical hair fiber analysis, *United States v. Nimmer*, 43 M.J. 252 (C.A.A.F. 1995), rape trauma syndrome, *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993); and urinalysis, *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

rules for courts-martial, U.S. Const. art. I, § 8, cl. 14, it is axiomatic that neither is free to disregard the Constitution when acting in the area of military affairs. See *Rostker v. Goldberg*, 453 U.S. 57, 67 (1967). "Congress remains subject to the limitations of the Due Process Clause, . . . but the tests and limitations to be applied may differ because of the military context." *Id.* Therefore, Petitioner's burden, which has failed thus far, is to demonstrate whether the Sixth Amendment right to present a defense does not apply to the military.

### B. *Daubert's* focus on civil trial evidence standards fails to accord and account for constitutionally-based protections inherent in criminal cases

This Court's pronouncement in *Daubert* signaled an end to the stringent "general acceptance" test in the federal courts. Unfortunately *Daubert*, based on a civil lawsuit, has been blindly applied without consideration of constitutional concerns in the vast majority of criminal cases. See, e.g., *United States v. Schneider*, 111 F.3d 197 (1st Cir. 1997); *United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997); *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1997); *State v. Wyatt*, 482 S.E.2d 147 (W. Va. 1996); cf. *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); but see *State v. Porter*, No. SC 15363, 1997 WL 265202 (Conn. May 20, 1997) (no right to evidentiary hearing on polygraph under Sixth Amendment); *Perkins v. State*, 902 S.W.2d 88 (Tex. Ct. App. 1995) (*per se* inadmissible rule does not violate Sixth Amendment). Thus, this Honorable Court has yet to consider the impact that the Sixth Amendment will have on Federal Rule of Evidence 702 and the trial judge's role as the "keeper" when possible exculpatory evidence stands ready at the "gate."

The highest military appellate court readily recognized the impact that due process rights will have on the admission of polygraph evidence in *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). That court discussed the due process impact in two respects: "First, in deciding whether defense evidence satisfies the relevance and helpfulness standards; second, in deciding whether the probative value of the evidence is outweighed by extraneous factors (Mil. R. Evid. 403)." *Id.* at 252.<sup>67</sup> The implicit suggestion gleaned from *Gipson* is that a trial judge should consider the nature of the purported exculpatory evidence as an additional factor of the *Daubert*/Rule 702 expertise analysis. This factor, incorporating Sixth Amendment due process concerns, must be afforded more weight than other items on the non-exclusive *Daubert* list.

<sup>67</sup> The court added that "[p]erhaps in these areas, judges should bend even further than normal in the direction of giving the accused the benefit of doubt...[I]f anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's." *Id.*



The Supreme Court has applied the Sixth Amendment in a variety of contexts in order to protect a criminal defendant's due process rights. In *Washington v. Texas*, 388 U.S. 14 (1967), this Court invalidated a state statute concerning competency of codefendants where it worked to prevent an accused from obtaining testimony from a witness.<sup>68</sup> Furthermore, in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court recognized that a state hearsay rule compromised the right to call witnesses on one's behalf.<sup>69</sup> Finally, a state's legitimate interest in barring unreliable evidence does not extend to a *per se* exclusion of evidence which is arguably reliable in a given case. *Rock v. Arkansas*, 483 U.S. 44 (1987).<sup>70</sup>

With the exception of New Mexico, the States fail to recognize the supremacy of valid Sixth Amendment rights over any 'legitimate' concern a particular jurisdiction might have with polygraphs.<sup>71</sup> While many States have refused to adopt *Daubert* as controlling on their evidence code,<sup>72</sup> no state's interpretation can operate contrary to express constitutional protections and rights. The Sixth Amendment mandates admission of exculpatory polygraphs in federal courts and, by virtue of the Fourteenth Amendment, in state trials.

<sup>68</sup> The defendant wanted to present testimony from a co-accused, contrary to a state rule disallowing such testimony, regarding his attempts to prevent the co-accused from shooting the deceased. *Washington v. Texas*, 388 U.S. at 16.

<sup>69</sup> In *Chambers*, a defense witness made several confessions to the murder for which the accused faced trial, but impeachment of one's own witness was foreclosed under state law. 410 U.S. at 289.

<sup>70</sup> In *Rock*, a *per se* rule impermissibly prevented the defendant from testifying about hypnotically refreshed memories. 483 U.S. at 62.

<sup>71</sup> A much-repeated fear among the anti-polygraph states is that "polygraph evidence will impermissibly infringe on the province of the jury to determine credibility." See Brief of the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner at 19-20. See also Petitioner's Brief at 26-29. This lack of confidence, given the sophistication of the modern venireman, is misplaced for a group often trusted with far more complicated, "near-infallible," evidence, such as DNA or rape trauma syndrome, and is certainly not reflective of the experience with courts-martial panels in the military justice system. "If we can have faith in a state trial jury, as suggested by the research to date, there is all the more reason to have faith in the court-martial panels that you present scientific evidence to." See M. Maxwell et al., *Recent Developments Concerning the Constitutionality of Military Rule of Evidence 707*, The Army Lawyer (DA Pam 27-50-265) 13, 16 (Dec. 1994) (quoting E. Imwinkelried, *The Standard For Admitting Scientific Evidence: A Critique From The Perspective of Juror Psychology*, 100 Mil. L. Rev. 99, 117 (1983)). Military juries are generally well-educated and sophisticated enough to understand complex evidence. The Uniform Code of Military Justice [hereinafter U.C.M.J.] provides that military jurors must be either commissioned or warrant officers, or enlisted persons senior in rank to the accused, selected on the basis of their "age, education, training, experience, length of service, and judicial temperament." U.C.M.J. art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1982).

<sup>72</sup> See Appendix (Summary Chart of State Jurisdictions).

### C. The Court of Appeals for the Armed Forces decision in the case *sub judice* was properly decided on Sixth Amendment grounds

The decision in *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), reflects the latest iteration in a series of attempts to define the constitutionality of categorically excluding polygraph evidence under Military Rule of Evidence 707 [hereinafter Rule 707]. As military courts have struggled with this issue, the resultant body of appellate law supports the proposition that Rule 707 is at odds with recent scientific evidence litigation and the Constitution itself.

As a direct result of the *Gipson* decision, Rule 707 was drafted in 1991 to categorically exclude from courts-martial any evidence relating to polygraph examinations. The basis for this rule, as laid out in the Manual for Courts-Martial's analysis of the Military Rules of Evidence, is the danger of polygraph tests misleading a jury by appearing "shrouded with an aura of near infallibility." Manual for Courts-Martial, United States, 1984, app. 22, Military Rules of Evidence analysis, at A22-48 (citing *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975)). Furthermore, the drafters of the rule were also concerned with the reliability of polygraph examinations. *Id.*

Military Rule of Evidence 707 was created contrary to a body of constitutional case law which recognizes that certain categorical evidentiary rules violate an accused's due process rights. The *Scheffer* opinion cites *Washington v. Texas* and *Rock v. Arkansas* as evidence of this Court's vigilance in protecting against similar Sixth Amendment abuses. *Scheffer*, 44 M.J. at 445.<sup>73</sup> Furthermore, the Armed Forces court noted the 'liberal thrust' of the Federal Rules of Evidence and the *Daubert* "gatekeeper" function wherein a judge must still apply a Rule 403<sup>74</sup> analysis prior to admitting or excluding such evidence. This gatekeeper function is the logical manifestation of a sound policy favoring the discretion of a sitting judge, who is familiar with the Constitution, over the collective opinion of the scientific community.

The case of *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994), was an early foray of the military courts into the Sixth Amendment implications of Rule 707.<sup>75</sup> In *Williams*, the Army Court of Military Review (now the Army Court of Criminal Appeals [hereinafter Army court]) rejected the policy con-

<sup>73</sup> The Armed Forces court noted that "the majority of federal circuits do not have a *per se* prohibition against polygraph evidence." *Id.* at 444.

<sup>74</sup> Military Rules of Evidence 403 is identical to the federal Rule 403.

<sup>75</sup> The Armed Forces court later reversed the Army court on the basis that the accused had not testified at trial and could not present exculpatory polygraph evidence without first taking the stand. *United States v. Williams*, 43 M.J. 349 (C.A.A.F. 1995). However, in the case at bar, appellant did testify at trial.

siderations articulated in support of a *per se* exclusion of polygraph evidence.<sup>76</sup> The *Williams* court held that the rule violated the appellant's Fifth Amendment right to a fair trial and Sixth Amendment right to produce favorable witnesses. *Id.* at 558. The Army court noted that Rule 707 does not even allow a judge to inquire whether polygraph evidence is relevant and helpful.

Against this backdrop of constitutional authority, the Armed Forces court found Rule 707 unconstitutional in the case at bar. The court held that "[a] *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil. R. Evid. 702 and *Daubert*, violates his sixth Amendment right to present a defense." *Scheffer*, 44 M.J. at 445. Thus, the gravamen of the court's holding below is rooted in the basic constitutional right to present a defense.<sup>77</sup>

This Court is ideally poised, then, to affirmatively recognize an accused's right to lay a foundation for the presentment of exculpatory polygraph evidence in their defense at trials by courts-martial. Furthermore, the polygraph is no longer an untested, unreliable sideshow gimmick but has gained acceptance, especially in the Department of Defense, to such an extent that many Government agencies have posited concerns of national security on the results of polygraph examinations.<sup>78</sup> Thus, if polygraph exams can result in the grant or denial of access to sensitive and critical areas impacting the security of millions of Americans — it follows that one American, especially a soldier, sailor, airman, or marine, should be allowed to present similar evidence to a panel who sits in judgment of the servicemember's guilt or innocence.

#### **D. This Court should adopt amicus' proposed preliminary due-process *Daubert* factor**

Trial courts must be required to weigh the potential due process concerns in criminal cases before continuing with the standard *Daubert* analysis concerning the admission of expert scientific evidence. The amicus therefore proposes that this Honorable Court delineate a "new" factor for Rule 702 consideration. The Court should prescribe this factor as a preliminary question for criminal

<sup>76</sup> In particular, the court described as "disingenuous" the rationale to exclude polygraph evidence based on its inherent unreliability, or "at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations." *Williams*, 39 M.J. at 558.

<sup>77</sup> Several jurisdictions, discussed *supra*, would eschew a categorical ban on a particular type of evidence in favor of allowing a court to conduct the customary Rule 401/403 balancing. See, e.g., *United States v. Posado*, 57 F.3d at 434.

<sup>78</sup> See *Williams*, 39 M.J. at 558.

trial judges, as gatekeepers of novel scientific evidence, to contemplate. As proposed:

The defense will be granted the opportunity to lay a foundation for the presentment of science-based expert evidence under a *Daubert*/Rule 403 analysis where the proffered evidence is relevant to a constitutional right of the accused. Admission of such proffered expertise is presumed in cases affecting a valid constitutional right and where the defense demonstrates the reliability of the technique. A guarantee of reliability can be demonstrated in a variety of manners, is dependent upon the facts of a given case, and is not limited to the following circumstances which tend to enhance reliability of a particular test: compliance with any statutory scheme providing for admission; whether the test was conducted by a qualified expert; whether the test procedures provide a trustworthy result; whether the examination is recorded for later observation; whether the opposing party has the ability to independently assess technique reliability; which party initiated the use of the technique in each case; whether the opposing party has a reasonable opportunity to conduct its own test; as well as any other conditions which tend to enhance reliability.

In applying this proposed standard to *Scheffer*, it is noteworthy that a Government law enforcement agency initiated and performed the exam in question. *Scheffer*, 44 M.J. at 443.<sup>79</sup> The military judge, under the standard *Daubert* analysis, should have admitted this exculpatory polygraph given the guarantees of reliability present in the case *sub judice*. The proposed due process factor, with its presumption, would operate to admit the Government-initiated exculpatory polygraph results.

Airman Scheffer's Sixth Amendment right to present a defense cannot be eviscerated by a mechanical *per se* exclusionary rule of evidence. The respondent was subjected to an attack on his credibility which Rule 707 left him powerless to defend against.<sup>80</sup> Had the military judge performed the proposed due

<sup>79</sup> See *State v. Baca*, 902 P.2d 65 (N.M. 1995) (justice and fairness dictated admission where State administered examination and knew results).

<sup>80</sup> The prosecution cross-examined Scheffer about the inconsistencies between his testimony and earlier statements to law enforcement. The Government's closing argument stressed that, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him." *Scheffer*, 44 M.J. at 444.



process analysis in the case at bar, Airman Scheffer would have been able to defend the attack on his credibility after he testified. An abuse of discretion standard of review will continue to be applied to a judge's determination on expertise admissibility to ensure consideration of the due process factor. See *Scheffer*, 44 M.J. at 447 (ruling on admissibility will not be reversed unless a clear abuse of discretion) (citing *Piccinonna*, 885 F.2d at 1537; *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996)).

This test also should be applied whenever a Confrontation Clause or other constitutional right is implicated. If, for example, the accused has evidence that a prosecution witness "failed" a relevant polygraph examination, then a judge should perform the proposed analysis. This additional due process factor could also be applied to cases involving novel scientific techniques other than the polygraph. An accused's request to present exculpatory "astrological" evidence would likely fail due to the lack of a scientific foundation or any serious intellectual debate about the technique.

As this Court first recognized in *Rosen v. United States*, 245 U.S. 467, 471 (1918), "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . leaving the credit and weight of such testimony to be determined by the jury." It is time for criminal courts to end the irrational fear of polygraphy born of the obsolete and crude technology of 1923.<sup>81</sup> The proposed due process factor will empower trial judges to recognize the validity of polygraphs where it is essential to ensure a fair trial and grant the accused a reasonable opportunity to present a defense. Above all else, "the Sixth Amendment was designed in part 'to make the testimony of a defendant's witnesses admissible on his behalf in court.'" *Rock v. Arkansas*, 483 U.S. at 54 (quoting *Washington v. Texas*, 388 U.S. at 22). Therefore, in light of the sound policy reasons discussed above, this Honorable Court should extend the constitutional protections heretofore recognized to servicemembers, notwithstanding any presidential rulemaking to the contrary.

<sup>81</sup> As John Wigmore observed in 1923 at the time *Frye* was decided: "If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it." James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, 1996 University of Illinois Law Review 363, 370 (quoting John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 875, at 237 (2d ed. 1923)).

## CONCLUSION

The decision of the Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted,

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# APPENDIX

## Summary Chart of State Jurisdictions

State	Uses FRE 702?	Uses <i>Daubert</i> or <i>Frye</i> ?	Polygraph Admissible
Alabama	Yes	Has not addressed <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
Alaska	Yes	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Arizona	Yes	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
Arkansas	Yes	Follows <i>Daubert</i>	Stipulation
California	No	Rejects <i>Daubert</i>	Stipulation
Colorado	Yes	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Connecticut	No	Follows <i>Daubert</i>	Inadmissible
Delaware	Yes	Follows <i>Daubert</i>	Stipulation
Florida	Yes	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
Georgia	Yes <sup>1</sup>	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Stipulation
Hawaii	Yes <sup>1</sup>	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Inadmissible
Idaho	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Stipulation
Illinois	No	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Indiana	Yes	<i>Daubert</i> not binding, but "helpful"	Stipulation
Iowa	Yes	Follows <i>Daubert</i>	Stipulation
Kansas	Yes <sup>1</sup>	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
Kentucky	Yes	Follows <i>Daubert</i>	Inadmissible
Louisiana	Yes	Follows <i>Daubert</i>	Inadmissible
Maine	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Inadmissible
Maryland	Yes	<i>Daubert</i> incorporated into state statute	Inadmissible
Massachusetts	No	Follows <i>Daubert</i>	Inadmissible
Michigan	Yes	Has not addressed <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible

<sup>1</sup> State did not adopt FRE 702, but the rule for admissibility is very similar.

State	Uses FRE 702?	Uses <i>Daubert</i> or <i>Frye</i> ?	Polygraph Admissible
Minnesota	Yes	Acknowledges <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Mississippi	Yes	Has not addressed <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Missouri	Yes	Acknowledges <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Montana	Yes	Follows <i>Daubert</i>	Inadmissible
Nebraska	Yes	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Nevada	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Stipulation
New Hampshire	Yes	Has not addressed whether <i>Daubert</i> supersedes <i>Frye</i>	Inadmissible
New Jersey	No	Acknowledges <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
New Mexico	Yes	Follows <i>Daubert</i>	Admissible
New York	No	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
North Carolina	Yes	Uses rule similar to <i>Daubert</i>	Inadmissible
North Dakota	Yes	Acknowledges <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
Ohio	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Stipulation
Oklahoma	Yes	Follows <i>Daubert</i>	Inadmissible
Oregon	Yes	Has not addressed <i>Daubert</i> - Uses 401/403 balancing test	Inadmissible
Pennsylvania	No	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Inadmissible
Rhode Island	Yes	<i>Daubert</i> question still open - Uses rule similar to <i>Daubert</i>	Inadmissible
South Carolina	Yes	Never adopted <i>Daubert</i> or <i>Frye</i>	Inadmissible
South Dakota	Yes	Follows <i>Daubert</i>	Inadmissible
Tennessee	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Inadmissible
Texas	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Inadmissible
Utah	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Stipulation

State	Uses FRE 702?	Uses <i>Daubert</i> or <i>Frye</i> ?	Polygraph Admissible
Vermont	Yes	Uses rule similar to <i>Daubert</i>	Inadmissible
Virginia	No <sup>2</sup>	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Inadmissible
Washington	Yes	Rejects <i>Daubert</i> - Uses <i>Frye</i>	Stipulation
West Virginia	Yes	Follows <i>Daubert</i>	Inadmissible
Wisconsin	Yes	Has not addressed <i>Daubert</i> - Uses rule similar to <i>Daubert</i>	Inadmissible
Wyoming	Yes	Follows <i>Daubert</i>	Stipulation

<sup>2</sup> Virginia has not adopted FRE 702 for criminal cases.